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# **The Kelsen-Schmitt Debate and the Use of Emergency Powers in Political Crises in Thailand**

**Rawin Leelapatana**

**A dissertation submitted to the University of Bristol  
in accordance with the requirements for award of the degree of  
Doctor of Philosophy in the Faculty of Social Sciences and Law  
School of Law**

**2018**

## **Abstract**

Carl Schmitt and Hans Kelsen were prominent jurists during the Weimar Republic who engaged in the debate on the nature and use of emergency powers in a political crisis of liberal democracy ('PCLD'). As a liberal, Kelsen advocated a law-based response to an emergency situation together with the narrow interpretation of emergency powers and constitutional review, whereas as an anti-liberal conservative, Schmitt called for legally unconstrained emergency decisions by the sovereign to exclude 'enemies' causing a political crisis. This thesis considers how this debate might apply to Thailand. In post-absolutist Thailand after 1932, the conflict between the pro-democracy and the conservative factions reflected the PCLD, and resulted in military coups together with martial law supported by the suspension of liberal democracy viewed as a threat to the nationalist-conservative tradition known as *Thainess* and other uses of emergency legislations by the government of both factions. Though the conservative, later known as the 'Yellow' faction, still holds the upper-hand in politics given its ability to engineer a coup—the invocation of sovereign authority in the Schmittian sense—such hegemony and ability have been declining in recent years due to the struggles for a commitment to liberal constitutionalism, including the fuller implementation of the Kelsenian project in 1997. The application of the Kelsen-Schmitt debate in the Thai context accordingly exemplifies an aspiring democracy struggling against the declining hegemony of the Schmittian idea. It then reveals what I call *the binary-star conception of emergency powers* which shows the gravitational pull between the increasing need to liberalise and institutionalise the Schmittian idea, especially by resorting to a Kelsenian legal-rational legitimacy, and the growing need to resort to Schmitt's idea of political struggle to move the Kelsenian liberal-democratic project forward. Such pull suggests an alternative normative perspective for reading Kelsen and Schmitt—'pragmatic hybrid' which comprises the ideas of 'the paradoxical friction', the politics of 'defective co-optation', and 'the fragile equilibrium'. The application of the Kelsen-Schmitt debate in Thailand then directs us to reassess their theories of law and politics, the conception of authority to invoke emergency powers, notably the competing conceptions of institution (i.e., the tension between legality and law) and the state of exception, their debate on the scope of emergency powers in political crises, the conception of legal and political accountability for the invocation and use of emergency powers, and the agony of heteronomy. It ultimately suggests reconsidering the theoretical structure underlying Kelsen's and Schmitt's models, including the function of liberalism in their debate.

To my beloved maternal grandmother, Nuansri

*Author's declaration*

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's *Regulations and Code of Practice for Research Degree Programmes* and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author. Parts of this thesis are presented at several conferences, notably the ASLI conference in Taipei (2015), Manila (2017), and Seoul, (2018).

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### **List of abbreviations**

1933 Act	Act for the Protection of the Constitution
AoH	Agony of heteronomy
CoI	A conflict of interest
CoP	Concept of the political
2005 Decree	the 2005 Emergency Decree on Public Administration in State of Emergency
DRMH	Democratic Regime of the Monarchy as the Head of State
EPP	Emergency powers paradox
EoC	Ethic of conviction
EoR	Ethic of responsibility
HOS	Head of State
ISA	the Internal Security Act 2008
M-17	Section 17 of the 1959 Constitutional Charter
M-44	Section 44 of the 2014 Interim Constitution
NACC	National Anti-Corruption Commission
NCPO	the National Council for Peace and Order
NRA	the National Reform Assembly
PAD	People's Alliance for Democracy
PCLD	Political crisis of liberal democracy
PDC	Politics of defective co-optation

PDRC	People's Democratic Reform Committee
PFCN	Post-foundational conception of normativity
Phibun	Field Marshal Plaek Phibunsongkhram
PoA	Project of authority
PPP	People's Power Party
PT	Pheu-Thai Party
PTL	Pure Theory of Law
SoE	State of exception
TRT	Thai-Rak-Thai party
TSD	Thai-style democracy
UDD	United Front for Democracy against Dictatorship

## **List of abbreviations (citation)**

### Carl Schmitt's works

- CoP* Carl Schmitt, *The Concept of the Political* (UCP 2007)
- ‘Pluralism’ Carl Schmitt, ‘The guardian of the constitution: Schmitt on pluralism and the president as the guardian of the constitution’ in Lars Vinx (ed)(tr), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2015)
- Three Types* Carl Schmitt, *On the Three Types of Juristic Thought* (Joseph W. Bendersky (tr), Praeger 2004)

### Hans Kelsen's works

- GTLS* Hans Kelsen, *General Theory of Law and State* (Anders Wedberg (tr), HUP 1945)
- PTL* Hans Kelsen, *Pure Theory of Law* (Max Knight (tr), 5<sup>th</sup> edn, Law Book Exchange 2008)

### Other works

- ‘EPP’ Victor V. Ramraj, ‘The emergency powers paradox’ in Victor V. Ramraj and Arun K. Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (CUP 2010)
- ‘Legal institutionalism’ Mariano Croce, ‘Does legal institutionalism rule out legal pluralism? Schmitt’s institutional theory and the problem of concrete order’ (2011) 7 Utrecht L Rev 42
- SOE* Giorgio Agamben, *State of Exception* (Kevin Attell (tr), UCP 2005)
- TCA vol.1* Jürgen Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society Vol.1* (Thomas McCarthy (tr), Polity Press 1986)
- TCA vol.2* Jürgen Habermas, *The Theory of Communicative Action: The Critique of Functionalist Reason Vol. 2* (Thomas McCarthy (tr), Polity Press 1989)

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Decision no. 15-18/2556 (2013)

Decision no.5/2557 (2014)

Decision no.9/2557 (2014)

### **The Constitutional Court orders**

Constitutional Court Orders no. 58, 59, 61, 63/2556 (2013); 45, 50/2557 (2014)

### **The Supreme Court cases**

Supreme Court decision no. 45/2496 (1955)

Black case no. 4552/2556 (2013)

## **PREFACE**

Carl Schmitt (1888-1985) and Hans Kelsen (1881-1973) were prominent jurists during the Weimar period in Germany (1919-1933) that witnessed a struggle for entrenching liberal democracy and a series of political crises. At the beginning of the 20<sup>th</sup> century, Germany was defeated in the First World War. The Treaty of Versailles not only required it to pay war reparations to the Allies and stripped it of some territories it had previously gained, but also led to the abolition of the German monarchical system and the inception of the Weimar Republic together with the adoption of parliamentary democracy and the constitution of 1919. Yet, the Republic was beset by conflicts from the very beginning.

The rightist-conservative elites were largely sceptical about the liberal parliamentary regime, viewing it as a cause of further fragmentation due to its openness which, in turn, accommodated a political space for both the communists on the left and the Nazis supporting extreme nationalism on the right. They sought to replace such a regime with nationalist-authoritarian rule. Many of them, including Schmitt, were outraged at the collapse of the monarchy and the Versailles settlement. Their shock was further aggravated by hyperinflation and the ‘stab-in-the-back’ myth (*Dolchstoßlegende*), according to which, the Weimar Republic was the result of a betrayal of the army by the centre-left civilian government which signed the armistice, subjecting Germany to territorial losses and the payment of war reparations. Put simply, for the right-wing conservatives, the Weimar Constitution was a shameful compromise and a source of a public emergency and political instability. The only bulwark against the collapse of the Weimar Republic was the Social Democratic Party (‘SPD’) which had a stronghold in the largest and most powerful *Land*—Prussia.

The tension between those advocating and those sceptical about the legitimacy of liberal democracy and its mechanisms for facilitating political stability can be characterised as ‘the political crisis of liberal democracy’ (‘PCLD’). In 1923, a state of emergency was invoked by the SPD government led by President Friedrich Ebert, the first president, by virtue of Article 48 of the Weimar Constitution to repress the PCLD resulting from the attempts to overthrow the Weimar Republic by the Nazis and the communists. After Ebert’s death, the rightist conservative Field Marshal Paul von Hindenburg became Reichspräsident in 1925. Notwithstanding a temporary period of relative stability between 1923 and 1929, Weimar experienced subsequent coalition governments. Nevertheless, the Great Depression made the regime of parliamentary democracy increasingly unpopular, while the Nazis had increased their seats in the Reichstag since 1928. Worse, Franz von Papen, an ultra-conservative aristocrat,

was later appointed by von Hindenburg as Chancellor in 1932, paving the way for another round of the PCLD, the uses of emergency powers, and the eventual collapse of the Weimar Republic. The new chancellor believed that an authoritarian turn was required to repress threats to national security, notably from the communists and the Nazis. Believing that the Reichstag was an obstacle to realise his goal, he did not hesitate to resort to Article 48 of the Weimar Constitution to subvert parliamentary democracy and to purge the social democrats from politics. Its extensive interpretation as envisaged by Schmitt together with a series of parliamentary dissolutions led to the curtailment of parliamentary checks. Later, Article 48 was exploited by Adolf Hitler, who came to power as Chancellor in 1933, in particular, to curtail constitutional rights, and to eradicate political opponents and eventually the Weimar Republic itself. Hitler became *Führer* (the supreme leader) in 1934 and with whom Schmitt was later affiliated.

Having experienced the PCLD during their professorships, both Kelsen and Schmitt developed their arguments suggesting the legal-political institutional framework concerning the nature and use of Article 48 and engaged in debate with each other. Their constitutional emergency models are based on each jurist's effort to establish peace within what each deemed to be a legitimate order through the top-down state mechanism. These elements rest on their divergent positions on whether liberal constitutionalism and liberal democracy should be complied with and preserved or contested and replaced.

Kelsen was a pro-democracy legalist and a former professor at the University of Cologne, who, owing to his Jewish ancestry, fled to the United States after Hitler ascended to power. Providing his famous *Pure Theory of Law* is read in combination with his support for liberal democracy, we can understand his thesis in terms of articulating and defending *the project of authority* ('POA')—the institutional condition under which the conformity of exercises of state power, including emergency powers, with a democratic legal constitution and its basic organisational principles is ensured. His legal and political stances are therefore premised on the presupposition that a liberal-based exercise of emergency powers is more legitimate because it is acceptable to every party to a conflict and preserves an opportunity for compromise among different interests.

By contrast, Schmitt was an anti-liberal conservative, and a former professor in Bonn and Berlin. His position on emergency powers mirrors a hardline form of 'realism'. To Schmitt, liberalism turns politics into *political romanticism*, that is, to simply the realm of 'endless discussion', and eventually precipitating political conflicts/crises. He eventually called for *the sovereign* capable of making decisions in times of political crises—the Head of State who



transcends the heterogeneity of the people, and unites the particular people/nation as one. It is also for such a person/institution to apply emergency powers to suppress ‘political enemies’—a threat to such homogeneity, notably liberal parliamentary democracy and groups/people challenging political homogeneity. For Schmitt, emergency measures contradicting and even suspending the principle of legality, thus precipitating the state of exception (‘the SoE’), can be justified if necessary to safeguard homogeneity. He later joined the Nazis, and radicalised his argument against Kelsen’s to justify Hitler’s rule, arguing that the latter had done everything the sovereign must do, including the elimination of ‘political enemies’.

The Kelsen-Schmitt debate culminated after the *Preussenschlag* (the Prussian coup)—an incident which paved the way for the end of liberal democracy in Weimar, and subsequently facilitated the rise of Hitler. In June 1932, the ban on the SA (*Sturmabteilung*)—the Nazis’ paramilitary organisation—was lifted by von Papen, precipitating violent clashes between the communists, the Nazis and the police in the Prussian town of Altona on 17 July. On 20 July, the Chancellor took this opportunity to resort to an emergency decree under Article 48 previously issued by the 84-year-old senile von Hindenburg, who was then under his influence, to dismiss the SPD-led (caretaker) Prussian coalition government headed by Otto Braun. By virtue of this emergency power, Prussia’s executive power was transferred to von Papen, who was, in turn, appointed Prussian Commissioner, thus placing its executive under direct administration of the conservative federal government. However, as we can see, the real objective of the *Preussenschlag* was to purge republicans and democrats and to take control of Prussia which was the strongest and largest bulwark against the rightist conservatives and the Nazis. Both von Papen and Kurt von Schleicher, the latter of whom served as Reich Minister of Defense under von Papen, wrongly believed that this strategy would first enable the federal government to purge ‘the left’, including the communists, and then to control ‘the right’, in particular, the Nazis.

Committing to the democratic ideas and legality and supporting the continuity of the Weimar Republic, the SPD chose to challenge the legality of this emergency decree before the *Staatsgerichtshof*—the quasi-constitutional court. The Court eventually decided the case on 25 October 1932, holding that von Papen’s *Preussenschlag* decree was justified as a means to safeguard national security and that it was for the President to exercise his discretion on this matter. It also rejected the Prussian government’s claim that the coup was a collusion between Hitler and von Papen. Yet, it also ruled that such a decree could not be exploited permanently to infringe Prussia’s autonomy, thus, in turn, upholding the seat of the Braun Cabinet in the *Reichsrat* (i.e., a *de facto* upper house). In other words, the verdict was quite a matter of

compromise and relatively confusing as it, on the one hand, declared the *Preussenschlag* decree constitutional, yet, at the same time, recognised its partial unconstitutionality.

Kelsen and Schmitt applied their theories to the court's judgment, the latter also acting as von Papen's counsel. Kelsen thought that the emergency decree in question was illegal and unconstitutional as it violated, in particular, the principle of democracy since it secured von Papen's authoritarian rule at the expense of pluralism. For him, the court should have totally annulled the legal effect of this unconstitutional/illegal emergency decree. By contrast, Schmitt endorsed the *Preussenschlag* decree, and repudiated the court's role in reviewing its constitutionality from the first instance. To him, given the *political* nature of the decree, the court, a *legal* organ, possessed no jurisdiction to scrutinise the decision made by the President to secure the political unity of the German people in the context of a volatile political situation. Nevertheless, von Papen had already dismissed members of the Braun Cabinet on 20 July, paving the way for the demise of Weimar and the rise of Hitler in 1933.

However, a study of the Kelsen-Schmitt debate should not be limited to, but can be applied beyond the Weimar context, including and especially Thailand's experience of emergency powers in the PCLD. Similar to Weimar, democracy in Thailand is nascent and unstable. Since its transition to a formal liberal democracy with a parliamentary system in 1932, the country has gone through an intermittent struggle for political power between the progressive, rising-democratic demands and the dominant rightist royalist-conservative elites, leading to a cycle of repression, violence and political crises. Emergency powers, either in the form of coups with martial law declarations or emergency legislation, were invoked in response to incidents deemed to be a political crisis on several occasions by the military and civilian government. What is obvious from resort to these powers is the tension it reveals in the Kelsen-Schmitt debate, that is, between the liberal attempt to respond to a political crisis through a rule-bound legalism together with the preservation of liberal democracy as the norm and the conservative manifestation of anti-liberal realism (i.e., the use of extra-normative measures directed at imposing the SoE) together with the attempt to label liberal democracy as the cause of the PCLD in the context of developing democracy.

This PhD thesis is theoretical as it adopts a framework of legal and political theory, and in particular, an extended engagement with the legal and political works of Kelsen and Schmitt, notably those on Article 48 of the Weimar Constitution, an approach which will enable us to understand what the liberal-democrat Kelsen and the rightist-conservative Schmitt understood as 'the norm' and 'the exception', and the institutional role of the state in dealing with emergency powers in the PCLD. It also adopts the 'neo-Kantian' approach employed by Max

Weber, whose arguments partially but significantly underlie Kelsen's and Schmitt's frameworks. Weber examined the relationship between *authority* and *value-judgment* within the politics of a modern liberalised state (i.e., the disenchanted world)—more specifically, the paradoxical relationship between *rationality* or *cognition* ('is') and *ideal entities* ('ought'). This study of the Kelsen-Schmitt debate on emergency powers in PCLD will be constructed around these two poles. I will revisit Kelsen's and Schmitt's theories of law and politics, and other key elements related to their application in the context of emergency powers in the PCLD, namely their conception of authority to invoke emergency powers, their debate on the scope of emergency powers in political crises, and their conception of legal and political accountability of such powers together with *the agony of heteronomy* ('the AoH'), that is, the tension between 'emergency authority to preserve a social order' and 'value-judgment on such authority'. These issues are simultaneously related to (a) the competing conceptions of 'institution' which connotes the tension between the legitimacy of legality and the radical legitimacy of law and (b) the notion the SoE inherent in the Kelsen-Schmitt debate. Contemporary contributions on emergency powers and legal and political philosophies will also be used to help explain Kelsen and Schmitt, though they do not principally concern the relationship between such powers and political crises.

Chapter 1 constructs a theoretical framework for this study, fully describing the institutional framework of the competing constitutional emergency models. I also assess the deficiencies of the approach employed by these works and explain why the Thai experience is used to expose 'the gap' left open by them. My key research questions are: *To what extent do the views of Kelsen and Schmitt on the nature and use of emergency powers in times of exceptional political situations apply to the distinctive Thai experience? Are there any elements of their models of constitutional emergencies which may need to be reconsidered/re-read in order to accommodate the Thai experience?* I seek to reassess the aforementioned key elements underlying Kelsen's and Schmitt's models and propose an alternative approach for reading their debate. The Thai experience, I will show, exposes the asymmetry between 'static' and 'dynamic', that is, between Kelsen and Schmitt as 'jurists/theorists' and Kelsen and Schmitt as 'representatives of raw conflicting interests and values'.

Chapter 2 is concerned with emergency powers in political crises in Thai historical perspective. The *constitutional saṃsāra*—the repetitive cycle of coups and emergency powers to overthrow parliamentary democracy considered by royalist-conservatives as the source of the PCLD in post-1932 Thailand—is my main focus. However, to understand the traditional

Thai notion of emergency powers and its resemblance with Schmitt's idea, the country's political history before 1932 needs to also be briefly examined.

In Chapter 3, I assess the contestation and the eventual collision between the attempts to maintain sovereign authority resembling Schmitt's model by the royalist-conservative faction and the struggles to liberalise emergency powers. Official documents, including declarations of states of emergency or internal security by the Thai government and the military to identify what types of emergency powers modern Thai polity normally adopts, and the Constitutional Court's decisions which affected the contours of emergency powers in the colour-coded crises are also considered.

In Chapter 4, I use the Thai experience to draw the theoretical lessons for the contributions of Kelsen and Schmitt by focusing upon the *internal* and *external* perspectives of the constitutional emergency model. The former connotes the extent to which Kelsen's and Schmitt's models might each be adapted to (re-)assert their political legitimacy and hegemony against the challenge by the opposing model, whilst the latter signifies their application and justification in the context of the collision between liberal movements and the attempts to maintain royal sovereign authority, which breeds the AoH and the PCLD and causes the total lack of consensus on whether Kelsen or Schmitt offers the best model. I answer these questions by reassessing the normative perspectives underlying their debate, the notion of 'institution' inherent in Schmitt's legal theory, Kelsen's post-foundational conception of normativity, the relationship between liberal democracy and the AoH, the concept of the SoE together with its effects on the problem of accountability, and the alternative function of liberalism.

Then, in Chapter 5, I ultimately use my synthesis in Chapter 4 to conclude *the binary-star conception of emergency powers*. This model is directed at challenging Kelsen's and Schmitt's competing views on the Weberian paradox of modernity and liberalisation, and offers an alternative understanding and reading of the relation between the two constitutional emergency models, including of their connection with social and political forces. It is based on the normative perspective of *pragmatic hybrid* which, in turn, comprises three key elements I coin in Chapter 4: (a) *the paradoxical friction* which connotes the friction between the growing need to separate legal 'ought' from 'is' to ensure the prevalence of anti-liberal realism over increasingly sturdy liberal forces on the one hand and their connection facilitated by the political struggles for the PoA against anti-liberal realism and its institutionalisation based on 'self-interested preservation' on the other (b) *the politics of defective co-optation* according to which liberalism and authoritarian rule cannot avoid the gravitational pull of, and, in fact, have to co-opt, the presence of their opposition, thus making each unable to absolutely prevail as the

norm; and (c) *the fragile equilibrium* which concerns the growing need to liberalise emergency powers in the PCLD by relying on political prudence to avoid ‘heavy costs and risks’ associated with such powers. The fragile equilibrium also involves the alternative understanding of the SoE.

# **Chapter 1: Conceptions of emergency powers in political crises: the Kelsen-Schmitt debate in Weberian perspective**

## **1. Introduction**

As its title illustrates, this PhD thesis mainly focuses on the Kelsen-Schmitt debate on the nature and use of emergency powers in the political crisis of liberal democracy ('PCLD'). Actually, Carl Schmitt's anti-liberal realist theory of emergency powers has recently become widely studied by many modern scholars who regard it as a conservative, anti-liberal theory championing authoritarian power structures.<sup>1</sup> Fewer scholars pay comprehensive attention to Hans Kelsen's liberal and normative view on emergency powers, Dyzenhaus, Greene, and Zwitter being three of the most prominent of these.<sup>2</sup> Nevertheless, the issue of emergency powers in the PCLD is largely ignored by these modern scholars. Many of them choose to instead apply Kelsen's and Schmitt's theories to explain the permanent state of emergency (Greene) and to discuss whether emergency powers are 'inside' or 'outside' a liberal-democratic legal order (e.g., Gross and Ní Aoláin), including their relationship with human rights standards (e.g., Criddle, Fox-Decent and Zwitter). They portray Schmitt's theory as a threat to a liberal legal order, and Kelsen's identity thesis—the principle of legality—as compulsory for any use of emergency powers. Caldwell, Dyzenhaus, McCormick, and Paulson are perhaps the most prominent scholars who study Kelsen and Schmitt with regard to the PCLD in Weimar.<sup>3</sup> Despite touching upon the role of an emergency provision—Article 48 of the Weimar Constitution—the main concern for Caldwell, Dyzenhaus, and Paulson is however not emergency powers, but the relation between constitutional theory and the PCLD. Dyzenhaus, as I will discuss in Chapter 4, instead chooses later to apply Kelsen and Schmitt to develop a *general* constitutional emergency model for established liberal democracies in his

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<sup>1</sup> Clement Fatovic, 'Filling the Void: Democratic Deliberation and the Legitimization of Extra-legal Action' in Clement Fatovic and Benjamin A. Kleinerman (eds), *Extra-Legal Power and Legitimacy: Perspectives on Prerogative* (OUP 2013); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006); Evan J. Criddle and Evan Fox-Decent, 'Human Rights, Emergencies, and the Rule of Law' (2012) 34 HRQ 39; Karin Loevy, *Emergencies in Public Law: the Legal Politics of Containment* (CUP 2016), pp 5-6; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis* (CUP 2006).

<sup>2</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Bloomsbury 2018), ch 2; Andrej Zwitter, 'The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy' [2012] ARSP 95; David Dyzenhaus, 'The compulsion of legality' in Victor Ramraj (ed), *Emergencies and the Limits of Legality* (CUP 2012), p 36.

<sup>3</sup> David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (OUP 1997); John P. McCormick, 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers' (1997) 10 Can JL & Jur. 163, p 187; Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (DUP 1997), ch 4; Stanley L. Paulson, 'Hans Kelsen and Carl Schmitt: Growing Discord, Culminating in the "Guardian" Controversy of 1931' in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (OUP 2017).

separate works. Meanwhile, although McCormick mainly focuses on Schmitt's support for the Weimar President's extensive emergency authority, he is silent on what Kelsen called *the agony of heteronomy* ('the AoH')—the tension between social order and individual autonomy—bred by the PCLD and its effects on the use of emergency powers.<sup>4</sup>

Based on the Kelsen-Schmitt debate in the context of Weimar, the PCLD connotes the competing views between liberal democrats and rightist conservatives on whether liberal democracy and constitutionalism should constitute the state's fundamental values. In other words, this incident primarily mirrors states struggling with a fledgling democracy rather than those experiencing what Rawls called 'a plurality of reasonable yet incompatible comprehensive doctrines', that is, doctrines which do not resist 'the essentials of a democratic regime'.<sup>5</sup> Given the friction it entails, the use of emergency powers in this context is more sharply challenged by 'the AoH' as they are applied against specific members of any given community. Kelsen and Schmitt witnessed the invocations of such powers to tackle a volatile political situation in post-war Germany until Hitler's rise to power which forced Kelsen to flee the country. Both applied their theories of law and politics to suggest how Article 48 of the Weimar Constitution should be applied, especially when the *Preussenschlag* occurred in 1932. Overall, while Kelsen championed emergency powers in the PCLD that commit to the liberal-democratic framework and preserves the chance for the politics of reconciliation, Schmitt supported dealing with the PCLD through extra-normative emergency powers made by the sovereign to exclude political enemies.

In this chapter, I revisit Kelsen's and Schmitt's theories of law and politics, and other key elements related to their application in the context of emergency powers in the PCLD, namely their conception of authority to invoke emergency powers, their debate on the scope and accountability of emergency powers in political crises, and the AoH. In Section 2, I examine the background to the Kelsen-Schmitt debate and then the scope of its key elements, namely emergency powers and the PCLD, through the lens of Max Weber's works on politics, the paradox of modernity and liberalisation, and the ethics of politics. Then, in Sections 3 to 5, I attempt to draw the full picture of the Kelsenian and Schmittian models of constitutional emergencies by assessing their key relevant notions, notably the competing conceptions of 'institution'—the tension between the legitimacy of legality and that of law—and the state of exception ('SoE'). Next, in Section 6, I assess the assumptions underlying both models, i.e.,

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<sup>4</sup> Hans Kelsen, *The Essence and Value of Democracy* (Nadia Urbinati and Carlo Invernizzi Accetti (eds), Brian Graf (tr), Rowman and Littlefield 2013), p 27.

<sup>5</sup> John Rawls, *Political Liberalism* (Columbia 2005), p xvi.

what elements help secure their effectiveness—before identifying the asymmetry inherent in the Kelsen-Schmitt debate, namely the asymmetry between Kelsen and Schmitt as jurists/theorists and Kelsen and Schmitt as representatives of raw conflicting interests. In the last two sections. I briefly consider Thai constitutional history in tandem with such asymmetry before applying this finding to construct the theoretical framework for synthesising Kelsen and Schmitt.

## **2. The ‘Weberian’ background to the Kelsen-Schmitt debate: modern politics and liberalism**

To construct a theoretical framework for considering the Kelsen-Schmitt debate on emergency powers in the PCLD, we first need to understand the background to their core theoretical stances and assumptions. As many scholars observe, Weber can be seen as an intellectual influence upon both Kelsen and Schmitt.<sup>6</sup> Thus, I will examine their debate in the context of Weber’s perspective on politics, including its ethics, and the disenchantment of the world, on which it rests.

### ***2.1 Politics***

Initially, it is useful to begin this section by explaining Weber’s position on *politics*. Though not explicitly citing Hobbes, Weber believed that *the state of nature* in which individuals are subject merely to their own will, and thus given the right to employ force to preserve themselves from others, is an undesirable political condition.<sup>7</sup> Sceptical about *a state of anarchy*, peace and security, for him, can only be realised when there is organised control over a society, that is, the organisation of *a modern state* to monopolise the means of domination and administration, notably the enactment of law and the legitimate use of coercive force.<sup>8</sup> It is this basic idea that underlies Kelsen’s and Schmitt’s theses.

Kelsen and Schmitt regarded politics as that part of everyday life which involves regulating human behaviour. They then shared the Weberian view that this practice is a matter of ‘conflicts of interest’, in that, it concerns competition for political power between different groups within the state and involves the assertion of ‘truth claims’ and the ‘will’ of competing

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<sup>6</sup> Antonino Scalone, ‘Führerprinzip and democracy in Weber and Kelsen’ in Ian Bryan, Peter Langford and John McGarry (eds), *The Reconstruction of the Juridico-Political: Affinity and Divergence in Hans Kelsen and Max Weber* (Routledge 2016); David Dyzenhaus, ‘Hermann Heller and the Legitimacy of Legality’ (1996) 16 Oxf. J. Leg. Stud. 641, pp 646-648; Wolfgang J. Mommsen, *Max Weber and German Politics, 1890-1920* (Michael S. Steinberg (tr), UCP 1984), p 387.

<sup>7</sup> Max Weber, ‘The Profession and Vocation of Politics’ in Max Weber, *Political Writings* (Peter Lassman and Ronald Speirs (eds), CUP 1994) p 310; Thomas Hobbes, *Leviathan* (J.C.A. Gaskin (ed), OUP 1996), pp 86-87.

<sup>8</sup> Max Weber, *Economy and Society: Volume I* (Guenther Roth and Claus Wittich (eds), UC Press 1978), pp 54-56.



interests, and accordingly ‘presupposes the conscious or unconscious assumption of *values*’.<sup>9</sup> Viewing politics as an activity within a modern state and, like Weber, disdaining a state of anarchy, state authority, for Kelsen and Schmitt, becomes an essential instrument, without which the main problem of politics, namely how to realise order—peace, normality and stability—in the context of struggling values and interests, cannot be resolved. In the process, they embraced Weber’s *top-down* approach to managing politics, namely by considering a modern state as ‘the *monopoly* of the *legitimate* use of physical force in the enforcement of its order’, which ‘has as its consequence *endorsement* of particular values’.<sup>10</sup> The monopoly of authority to produce these desired outcomes is the central characteristic of ‘sovereignty’.<sup>11</sup>

In summary, Kelsen and Schmitt adopted the Weberian two-pronged approach to politics. To them, politics mirrors both ‘objectivity’ and ‘subjectivity’, thus containing two key elements, namely (a) state *authority*; and (b) the realm of *values* and *interests*. It is therefore always a matter of *struggles* and *conflicts*, not just for influencing the distribution of state power, but also for hegemony between/among divergent values. These two elements are then linked to the processes of modernisation and liberalisation.

## ***2.2 The paradox of modernity and liberalisation: the basis of the PCLD***

Modernity, to Kelsen and Schmitt, connotes what Weber called *the disenchantment of the world*, and produces two main consequences.<sup>12</sup> Firstly, it facilitates the triumph of ‘rationalism and intellectualism’ over ‘mysterious incalculable forces’, especially when state authority is wielded.<sup>13</sup> However, secondly, rationalisation simultaneously buttresses *the awakening of the self*, which, in turn, parallels liberalisation.<sup>14</sup> In the process, the individual is

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<sup>9</sup> Carl Schmitt, *The Crisis of Parliamentary Democracy* (Ellen Kennedy (tr), MIT Press 1988), pp 36-38 (emphasis added); Carl Schmitt, *State, Movement, People* (Simona Draghici (tr), Plutarch Press 2001), pp 4, 15; Carl Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political* (A. C. Goodson (tr), MSU Press 2004), p 3; Hans Kelsen, ‘Science and Politics’ (1951) 45 Am. Political Sci. Rev 641, p 641 (emphasis added); Kelsen, *The Essence*, p 29; Max Weber, ‘Politics as a Vocation’ in Max Weber, *From Max Weber: Essays in Sociology* (H.H. Gerth and C. Wright Mills (trs), Routledge 2009), p 78.

<sup>10</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab (tr), UCP 2005), p 12; Hans Kelsen, *General Theory of Law and State* (Anders Wedberg (tr), HUP 1945), pp 22, 284-285 [‘GTLS’]; Hans Kelsen, ‘The Nature and Development of Constitutional Adjudication’ in Vinx (ed)(tr), *The Guardian*, p 22; Max Weber, ‘The objectivity of knowledge in social science and social policy’ in Sam Whimster (ed), *The Essential Weber: A Reader Paperback* (Routledge 2004), p 362; Weber, *Economy*, p 54.

<sup>11</sup> Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer and Christopher Thornhill (trs), DUP 2008), p 101; Hans Kelsen, *Pure Theory of Law* (Max Knight (tr), 5<sup>th</sup> edn, Law Book Exchange 2008), p 343 [‘PTL’].

<sup>12</sup> Carl Schmitt, *Political Romanticism* (Guy Oakes (tr), Transaction Publishers 2011), p 65; Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L. Paulson (trs), Clarendon Press 1992), p 21.

<sup>13</sup> Max Weber, ‘Science as a Vocation’ in Weber, *From Max Weber*, p 139.

<sup>14</sup> Theodor W. Adorno and Max Horkheimer, *Dialectic of Enlightenment* (John Cumming (tr), Verso 1997), p 9.

supported in resting his intellectual orientations to life on *political values* which he deems to be an ultimate end existing beyond the realm of reasoned debate and cognition.<sup>15</sup> Modernisation and liberalisation accordingly stimulate, in Weber's words, *the polytheism of values*, and eventually spread political struggles by urging pluralistic self-interests to compete freely with one another to put forward their preferred political values and ends for state authority.<sup>16</sup> This intensifies the AoH—the political tension between an objective social order created by the state's monopoly of force and an individual's subjective will/value.<sup>17</sup>

Kelsen and Schmitt recognised *the Weberian paradox of modernity and liberalisation*, namely that the triumph of reason and the rationalisation of political power, facilitated by the disenchantment, paradoxically expose, but still inextricably depend upon, the *ideal* realm rendered by 'the awakening of *the self*'.<sup>18</sup> Their two-pronged approach to politics in combination with this tense, but inextricable, relationship between *rationality/system* and *the self* characterising modernity reveal their agreement and divergence in general as follows.

For Kelsen and Schmitt, the triumph of reason over delusion and mysticism, which enhances human capacity to 'master all things by calculation', fosters greater demands for *human-centred* reasons together with *objective* and *rational* criteria and values for justifying the state's monopoly of legitimate force—its authority—and its application to deal with the AoH.<sup>19</sup> Accordingly, they concede the importance of a modern state, notably the irreversibility of bureaucratisation, and that *democracy* is the most rational regime in the modern world.

Nevertheless, Kelsen and Schmitt disagreed over the legitimacy of liberalism itself, that is, its status as the state's fundamental value and as a value guiding the exercise of its authority in dealing with the polytheism of values. They disagreed about whether liberalism really reconciles the two poles of the AoH entailed by political polytheism, or instead threatens disunity and the collapse of the homogeneous state. Where Kelsen advocated liberalism as the state's fundamental value due to its capability to forge compromise out of conflicting interests, Schmitt thought that the awakening of 'the self' galvanises the AoH, generates disunity within the state, and weakens its monopoly of force.

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<sup>15</sup> Schmitt, *Political Romanticism*, p 159.

<sup>16</sup> Ibid, p 116; Max Weber, 'Between Two Laws' in Weber, *Political Writings*, pp 78-79.

<sup>17</sup> Kelsen, *The Essence*, p 27.

<sup>18</sup> N.E. Simmonds, 'Review: Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar by David Dyzenhaus' (1998) 57 CLJ 195, p 195 (emphasis added).

<sup>19</sup> Weber, 'Science', p 139; Max Weber, 'The Social Psychology of the World Religions' in Weber, *From Max Weber*, p 290.

### ***2.3 Weberian ethics underlying the Kelsen-Schmitt debate on emergency powers in the PCLD***

Kelsen's and Schmitt's divergent views on the paradox of modernity and liberalisation above are intrinsically related to Weber's two ethics of politics which constituted the backbone of the emergency provision of the Weimar Constitution—Article 48. The synthetic consideration of these two issues enables us to derive the role of emergency powers in the PCLD from the Kelsenian and Schmittian standpoints.

After the First World War, the monarchy was dissolved in Germany. The National assembly produced the new constitution confirming the establishment of a formally liberal democratic republic—the Weimar Constitution—which was subsequently signed by President Ebert in 1919. Weber played an influential role in providing its theoretical framework, just before his passing in 1920. He was very concerned with the problem of how to establish political stability in a volatile democracy such as the Weimar Republic, causing him to propose a balance between two ethics of political conduct, namely *the ethic of responsibility* ('EoR') and *the ethic of conviction* ('EoC'). As a liberal, he considered the EoR—the legality of bureaucratic administration and political participation through party politics—essential for guaranteeing the continuity of democracy and compromise in the context of divergent party interests.<sup>20</sup> However, he also espoused the EoC which entrusts *a plebiscitary leader*—a charismatic president chosen by plebiscite and capable of inspiring a large number of political followers—with roles in counterweighting party politics and the bureaucratic state, and even in governing alone through emergency decrees in times of political crises by virtue of what becomes Article 48 of the Weimar Constitution.<sup>21</sup>

Article 48 of the Weimar Constitution:

*'If a land does not fulfil its duties under [this] constitution ..., the President may compel its action through the use of armed force.*

*Provided public order is severely threatened ..., the President may employ measures necessary to restore public order ... [H]e may suspend constitutional rights enshrined in Articles 114 [the right to liberty], 115 [the right to respect for his home], 117 [the right to respect for his correspondence], 118 [the right to hold opinions], 123 [the right to unarmed and peaceful assembly], 124 [the right to freedom of association] and 153 [the right to the peaceful enjoyment of one's private properties] ... partially or entirely.*

*The President is obligated to inform [Parliament] immediately all [emergency] measures are employed ...'*

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<sup>20</sup> Max Weber, 'Parliament and government in Germany under a New Political Order' in Weber, *Political Writings*.

<sup>21</sup> Ellen Kennedy, 'Emergency and Exception' (2011) 39 *Political Theory* 535, p 537; Weber, 'Politics', p 121.

Put differently, this idea ‘combines personalism and structure [, and] ... favours the rise of individuals who present themselves as representatives of the masses’ and plays an important role in maintaining the unity of the national state challenged by pluralistic liberalism.<sup>22</sup> Nevertheless, these roles based on the EoC are still balanced by the EoR—the duty to respect the legality of bureaucratic administration.<sup>23</sup>

After Weber’s death, Kelsen and Schmitt witnessed the political instability of the Weimar Republic, including more intense events theoretically characterised as ‘political crisis’, namely a high degree of societal polarisation leading to high levels of political and mass mobilisation, violent clashes of arms between organised groups, a coup d’état and political repression, but not quite reaching the threshold of civil war.<sup>24</sup> Acknowledging the absence of ‘universal political morality’ in a disenchanted world, Kelsen and Schmitt asserted that what genuinely constitutes a *political crisis*, as in Weimar, depends on the question of the legitimacy of *fundamental/high-priority values* held by particular political actors, leading to disputes over what political values are hegemonic for a particular political order and provide the basis for political authority.<sup>25</sup> This circumstance connotes those *perceiving a ‘greater-than-usual’ threat* to purported fundamental values, in particular, a perceived threat to overthrow the regime, and their attempt to counter this threat, possibly through emergency powers as right-wing nationalist elites did in Weimar.<sup>26</sup> Put differently, while violence and disorder are pertinent factors, they are not necessary and decisive as indicators of what constitutes a political crisis. Instead, the existence of the latter is actor-centred, and intrinsically intertwined with political values and ends—the realm of *ideal entities*.<sup>27</sup>

The growing intense discord between the liberal and anti-liberal views on the paradox of modernity and liberalisation, which bred the problem of the AoH and the risk of violence and antagonistic mobilisation, culminated in the PCLD—more precisely, *the Preussenschlag*

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<sup>22</sup> Stefan Breuer, ‘The Concept of Democracy in Weber’s Political Sociology’ in Ralph Schroeder (ed), *Max Weber, Democracy and Modernization* (Macmillan 1998), p 8.

<sup>23</sup> Mommsen, *Max Weber*, p 386.

<sup>24</sup> Leon Hurwitz, ‘Contemporary Approaches to Political Stability’ (1973) 5 *Comparative Politics* 449, pp 449-454; Vicenç Fisas Armengol and others, ‘Alert 2015! Report on conflicts, human rights and peacebuilding’ (Escola de Cultura de Pau 2015), p 97.

<sup>25</sup> Carl Schmitt, ‘The guardian of the constitution: Schmitt on pluralism and the president as the guardian of the constitution’ in Lars Vinx (ed)(tr), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2015), p 146 [‘Pluralism’]; Claudia Auer, ‘Conceptualizing Political Crisis and the Role of Public Diplomacy in Crisis Communication Research’ in Andreas Schwarz, Matthew W. Seeger and Claudia Auer (eds), *The Handbook of International Crisis Communication Research* (Wiley Blackwell 2016), pp 120-121; Dyzenhaus, ‘Hermann Heller’, p 650; Hans Kelsen, ‘Foundations of Democracy’ (1955) 66 *Ethics* 1, p 16.

<sup>26</sup> Ekkart Zimmermann, *Political Violence, Crises and Revolutions* (Routledge 1983), pp 189-190, 203; Nick C. Sagos, *Democracy, Emergency, and Arbitrary Coercion* (Brill 2015), p 139.

<sup>27</sup> Jürgen Habermas, *Legitimation Crisis* (Polity Press 1988).

and eventually the Nazi takeover. Meanwhile, Kelsen and Schmitt recognised the place of emergency powers under Article 48 of the Weimar Constitution in responding swiftly to threats to national security during the PCLD. Though emergency powers are normally seen as involving resort to repression, such as preventive detention, media censorship, the prohibition of public gathering or the deployment of troops, Kelsen and Schmitt, in their *Preussenschlag* debate, recognised other powers not directly concerning those uses, for instance, the appointment of a commissar/dictator, the usurpation of state power, or the dissolution of some state functions, by virtue of ‘special authority’ such as under Article 48. Thus, while the realm of ‘*ought*’ (value-judgment) is of greatest importance for determining what constitutes a political crisis, that of ‘*is*’ (form of authority) designates what counts as emergency powers.

Kelsen’s attempt to deal with the paradox of modernity and liberalisation and the AoH through liberal democracy is bolstered by his adoption of the EoR, while Schmitt chose to radicalise the EoC by resorting to the concept of the SoE.<sup>28</sup> It then follows that the former believed that the response to the PCLD should be by confining emergency powers to ‘the formal aspect of reason’, namely formally legal-rational, machine-like technical authority or the Weberian *iron cage of rationality*, while the latter advocated ‘the dependence of values upon the *will*’ together with authoritarian emergency measures.<sup>29</sup> Each scholar eventually conceived the other’s thesis as his defective antipode, in need of refutation. The details of the two ethics will be more comprehensively discussed later. What is important here is that, given their different views on the application of emergency powers, a conflict between them then arises. In particular, where extra-normative decisions on an emergency situation are deemed authoritative from the Schmittian perspective, they are illegal and lack authority from its Kelsenian counterpart. Realising this problem, I choose to use the term ‘emergency powers’, and strive to define it in a sufficiently inclusive way.

Kelsen and Schmitt realised that emergency powers lead to the re-allocation of political power, notably the consolidation of the executive power and security forces, thereby affecting the normal law-making process by Parliament and imposing greater restrictions on rights and freedoms.<sup>30</sup> However, the term ‘emergency powers’ employed here is much broader than ‘state of emergency’, which merely encompasses situations in which an exigency is formally declared

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<sup>28</sup> Dyzenhaus, *Legality*, p 14.

<sup>29</sup> Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Talcott Parsons (tr), Dover 2003), p 181; Simmonds, ‘Review’, p 195.

<sup>30</sup> Carl Schmitt, *Dictatorship* (Polity Press 2014), p 150; See Carl Schmitt, *The Concept of the Political* (George Schwab (tr), UCP 2007), p 32 [‘the CoP’]; Kelsen, *PTL*, p 212.

by virtue of statutory laws (*de jure* emergency).<sup>31</sup> Apart from emergency powers employed in a *de jure* emergency, there is also the situation of ‘*de facto* emergency’ in which these powers are applied without being declared an emergency situation and extra-normative practices, notably the sovereign’s emergency decisions, which liberals regard as lacking authority.<sup>32</sup> Yet, the term does not include ordinary legislation which addresses a national security matter, notably the criminal code, but does not lead to the formal re-allocation of political power. Accordingly, I follow Ramraj and Thiruvengadam by defining ‘emergency powers’ as:

*‘coercive powers, claimed or invoked by or on behalf of the state [either in forms of powers enshrined in ‘laws’ or ‘extralegal means’ especially coups d’état together with a formal or de facto imposition of emergency], the purpose of which is to address [the PCLD] which, in the view of those who invoke it, cannot be addressed by ‘ordinary’ [measures].’*<sup>33</sup>

In the next four sections, I strive to draw the full picture of Kelsen’s and Schmitt’s models of constitutional emergencies.

### **3. The realms of ‘is’ and ‘ought’ underlying the Kelsen-Schmitt debate: the backbone of the competing models**

From the above, the relationship between the two cores of this PhD thesis—emergency powers and the PCLD—is fundamentally based on the two key elements in Weber’s definition of politics, that is, (a) state authority to secure a social order and (b) competing value-judgments threatening such an order. Ostensibly, the fundamental problem associated with the PCLD is not simply whether emergency powers rest ‘inside’ or ‘outside’ the legal order, in particular, how these powers should be interpreted and applied in ways that respect a liberal constitutional order, nor the problem of the permanent state of emergency according to which emergency powers supposed to be temporary are perpetuated and normalised, thus making the norm-exception dichotomy meaningless.<sup>34</sup>

Rather, the question central to the Kelsen-Schmitt debate is whether liberalism—liberal democracy and liberal constitutionalism—should constitute ‘the norm’ and therefore the guiding value of a social order—the state. Nevertheless, given a high level of social polarisation bred by the PCLD, its relation with emergency powers is, no doubt, antagonistic, thus vindicating the tension between *the process of domination* (claim-right) or *facticity* which

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<sup>31</sup> Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (Penn Press 1994), p 8.

<sup>32</sup> Ibid, pp 11-15.

<sup>33</sup> Victor V. Ramraj and Arun K. Thiruvengadam, ‘Introduction: emergency powers and constitutionalism in Asia’ in Ramraj and Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge University Press 2010), p 2.

<sup>34</sup> Greene, *Permanent States of Emergency*, p 33.

signifies ‘coercive enforcement’ and *the process of evaluation* (justification-right) or *validity* which concerns ‘rational acceptability’.<sup>35</sup> To clarify this point, I turn to the *empowerment* and *binding-ness* perspectives of emergency powers.

The *empowerment* perspective is concerned with the exercise of state authority or facticity ‘is’. Recognising the essence of emergency powers and adopting the Weberian definition of politics, the problem Kelsen and Schmitt initially examined is: *How can such powers be attributed to the state?* To them, it is only because an enforcer of emergency powers is *an authority* that actions undertaken during a political crisis have binding force and generate a duty to obey.<sup>36</sup> In other words, the pre-ordained source of authority enables the assertion of *a claim-right*—the entitlement ‘to press a demand with respect to something or other against another individual.’<sup>37</sup> This perspective thus principally prioritises the right to impose an authority’s will.<sup>38</sup>

The assertion of claim-right parallels the duty of its addressees to perform or refrain from certain behaviour. The subjective wills about the merits of such imposition or value ‘ought’ of these addressees underpin the *binding-ness* or *justification* dimension. The fact that the superior has a claim-right therefore involves the assertion of *justification-right* or ‘a response to the demand for the justification of their behavior’, i.e., that any particular emergency actions are justified by virtue of the maintenance of social peace or of the defence of the social order against destructive forces.<sup>39</sup>

The invocation of emergency powers in the PCLD, i.e., to press a claim-right, such as the *Preussenschlag* decree, normally preserves a particular regime or norms/values, thereby benefitting particular segments of society, and disadvantaging others. Given that the addressees (e.g., the Prussian government) hold an opposing political ideology, emergency powers cannot avoid the question from the justification-right dimension of whether they are genuinely applied in response to national security, or deliberately to suppress their enforcers’ political opponents. Emergency powers in the PCLD then encounter the problem of the AoH already bred by the confrontation between liberals and conservatives, causing a greater rift between *facticity* and *validity*. In other words, they have to struggle with disagreement over their ‘substantive merits’

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<sup>35</sup> Kelsen, ‘Foundations’, p 15; Hugh Baxter, ‘Habermas’s Discourse Theory of Law and Democracy’ (2002) 50 Buff. L. Rev. 205, p 240; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg (tr), Polity Press 1996), p 256.

<sup>36</sup> R.B. Friedman, ‘On the Conception of Authority in Political Philosophy’ in Joseph Raz (ed), *Authority* (NYU Press 1990), p 57; R.P. Wolff, ‘The Conflict between Authority and Autonomy’ in Raz (ed), *Authority*, p 20.

<sup>37</sup> R. Lasenson, ‘In Defense of a Hobbesian Conception of Law’ in Raz (ed), *Authority*, p 35.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid, pp 35-38.

between enforcers and addressees, and therefore with the problems regarding (a) *How should emergency powers be applied in light of the AoH already hastened by the PCLD?* and (b) *How should the AoH associated with emergency powers in the PCLD be dealt with?* Kelsen's and Schmitt's positions in this light are based on the ethic of political conduct and the kind of political regime which they advocated.

In the broadest perspective, the tension between the *empowerment* and *binding-ness* perspectives of emergency powers signifies the neo-Kantian elements inherent in Weber's thesis, that is, the distinction between (a) '*what is*' or *cognition*, which is the sphere of actions and events taking place and capable of being experienced in the world; and (b) what '*ought to be*' or *ideal realm* lying beyond natural and sociological facts.<sup>40</sup> I seek to comprehensively examine the Kelsen-Schmitt debate in the light of these two realms. In the process, their competing theories of politics which focus on the arrangement of state power in the light of the AoH have to be examined in tandem with those of law which connote the legitimate use of such power.

Besides, from the above '*is-ought*' distinction, two levels of conflict can also be inferred from the Kelsen-Schmitt debate. From the '*what is*' dimension, I am speaking of what Kelsen and Schmitt actually proposed. Here, I therefore regard them as '*theorists of political crisis*' and of '*positivism*' and '*anti-positivism*' respectively.<sup>41</sup> Nevertheless, from its '*what ought*' counterpart, rather than simply regarding them as legal and political theorists, the Kelsen-Schmitt debate also mirrors an ideological/political conflict. Given that the PCLD—the legitimacy of a liberal democratic regime—constitutes its core, their debate represents *raw conflicting interests and values*, in that, their theses concern conflicting ideological positions: liberal democracy and right-wing conservatism, an antagonism which, as it becomes more intense, reaches the threshold of '*political crisis*'.

All the above distinctions constitute the backbone of this PhD thesis, and must be kept in mind when studying the Kelsen-Schmitt debate in the following three sections. Section 4 concerns Kelsen's and Schmitt's competing positions on the norm-exception dichotomy in the Weberian perspective in relation to the problem of the AoH by turning to their competing theories of politics. Then, in Section 5, I consider their contrasting theories of law in the light of their divergent ethics of politics to draw the full picture of their constitutional emergency models. Here, I examine the overall structure of their models, including the opposing

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<sup>40</sup> Max Weber, 'Bureaucracy' in Weber, *From Max Weber*, p 221.

<sup>41</sup> Peter E. Gordon and John P. McCormick, 'Weimar Thought: Continuity and Crisis' in Peter E. Gordon and John P. McCormick (eds), *Weimar Thought: A Contested Legacy* (PUP 2013), p 1.



conceptions of ‘institution’, which involve how the authority in a matter of emergency powers should be wielded, and the SoE. Kelsen and Schmitt, I will show, disagreed over what can be deemed as the legitimacy of legality and the legitimacy of law.

#### **4. Liberalism as the centre of Kelsen’s and Schmitt’s competing theories of politics: the norm-exception dichotomy in Weberian perspective**

At the outset, Kelsen and Schmitt, though mentioning it several times in their debate on the nature of Article 48 of the Weimar Constitution, recognised the volatile nature of an emergency situation. However, if meticulously reading their works and considering their background, we can at least derive what they preferred as normal politics or *the norm* and as the threat to a fundamental value guiding the response to the paradox of modernity and liberalisation or *the exception*. Their adoption of the EoR and the EoC to different degrees and to the exclusion of the other comprehensively explains why liberalism is/is not appropriate as ‘the norm’ of the state. In this part, I turn to their competing views in this respect.

##### ***4.1 Kelsen and the EoR: political compromise and autocracy***

Kelsen expressly championed Weimar democracy. Parliament, he wrote, is the best place where ‘the will of the state’ is fostered by including opposing wills of majority and minority, notably through ‘dialectical procedures’ which hinge upon ‘speech and counter-speech, argument and counterargument’, and is expressed through the medium of law.<sup>42</sup> Given the impossibility of a fully-fledged direct democracy in the modern world, political parties become prominent mediators between individual interests and the formation of the state’s will within Parliament.<sup>43</sup> Schmitt, as will be discussed, strongly criticised Kelsen’s theory of democracy for failing to provide any means for preventing ‘public enemies’ from legally participating in Parliament. By largely focusing on majority rule and parliamentary procedures, it has also been criticised as too procedural, thus failing to consider the moral values inherent in democracy, notably the issue of human rights.<sup>44</sup> Nevertheless, it is more beneficial to examine the reasons why Kelsen saw liberal democracy’s potential for reconciling the PCLD.

Even against the backdrop of the PCLD in Weimar, Kelsen kept reminding the government of the importance of defending freedom and autonomy, considering this action necessary for facilitating *peaceful* coexistence among opposing interests. This also reflects his awareness of the risk of a political crisis engendered by autocracy. Inspired by Rousseau’s idea,

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<sup>42</sup> Kelsen, *The Essence*, pp 40, 69.

<sup>43</sup> Kelsen, *GTLs*, pp 294-295.

<sup>44</sup> See Christine Chwaszcza, ‘Kelsen on Democracy in Light of Contemporary Theories of Human Rights’ in Peter Langford, Ian Bryan, and John McGarry (eds), *Kelsenian Legal Science and the Nature of Law* (Springer 2017).

Kelsen, to start with, believed that liberal democracy is ‘a social form which protects every member and where every individual is connected to all the other members and yet remains as free as before.’<sup>45</sup> Above all, he adopted Weber’s EoR as an ethical virtue suitable for political life. This ethic underlines a correspondence between political actions and their consequences, therefore, political actions always have to take into account and weigh ‘the end, means, and the secondary results’.<sup>46</sup> It then imposes a responsibility on political actors to act in accordance with preordained rules, in particular, the law, and to be answerable for the foreseeable impact of their conduct.<sup>47</sup> Moreover, its call for weighing signifies that such an ethic presumes inevitable value conflicts in a disenchanted world, rather than bringing human behaviour into harmony with the ultimate conviction.<sup>48</sup>

Overall, Kelsen saw irreducible pluralism and the ongoing AoH in liberal democracy as an opportunity. He praised liberal democracy for providing the best hope for pacifying a volatile political situation caused by divergent and incompatible ultimate values and ends on a relatively enduring basis, through peaceful *compromise* among opposing interests, that is, through ‘a norm that neither entirely conforms with the interests of one party, nor entirely contradicts the interests of the other.’<sup>49</sup> This political standpoint can be more theoretically described as follows.

Putting emphasis on political responsibility, answerability, and the polytheism of values, liberal democracy sets neither ‘friendly quality’ nor ‘absolute value’ which would justify any use of state authority to exclude interests for being ‘the others’, but recognises only *political relativism* which presupposes the human being as ‘the creator of his world’, thus recognising, in the process, their freedom and autonomy as fundamental elements of a political system.<sup>50</sup> By presupposing individual freedom/autonomy and relative truth and values, it subsequently implies the equality of all under the law together with tolerance and the mutual respect of different political opinions.<sup>51</sup> Liberal democracy then calls for the state’s responsibility to protect individual rights and freedoms, notably the rights of minorities and the

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<sup>45</sup> Martin Šimsa, ‘The role and nature of freedom in two normative theories of democracy’ (2010) 20 Human Affairs 114, p 116.

<sup>46</sup> Weber, *Economy*, p 26.

<sup>47</sup> Weber, ‘Politics’, p 120.

<sup>48</sup> Bradley E. Starr, ‘The Structure of Max Weber’s Ethic of Responsibility’ (1999) 27 Religious Ethics 407, p 409.

<sup>49</sup> Kelsen, *GTLS*, pp 13-14, 288; Hans Kelsen, ‘the judgment of the *Staatsgerichtshof* of 25 October 1932’ in Vinx (ed)(tr), *The Guardian*, pp 230-231, 236-237.

<sup>50</sup> Hans Kelsen, *What Is Justice?: And Justice, Law and Politics in the Mirror of Science* (UC Press 1957), pp 198-200; Kelsen, ‘The Nature’, p 72.

<sup>51</sup> See Kelsen, ‘Foundations’, pp 27-28.

right to freedom of expression and political participation, and to establish legal mechanisms for guaranteeing the EoR, i.e., the lawfulness of the exercise of state authority.<sup>52</sup> Accordingly, this regime leaves opposing interests a public space under which to voice, criticise and negotiate their views, and even to revise them in future, without fear of state or social repression, thus ensuring the opportunity of political compromise and reconciliation.<sup>53</sup>

Kelsen's assertion that a compromise between/among competing interests is required for peacefully minimising political conflicts/crises on a relatively enduring basis simultaneously reflects his scepticism about replacing liberal democracy with autocracy. This part of his writing mirrors his position as a political thinker who provided an arsenal of arguments for defending liberal democracy. For him, autocracy is synonymous with dictatorship, despotism and totalitarianism. Contrary to liberal democracy, it subjects members of a social order to the ruler's absolute authority, without allowing them to participate in determining the scope of its content and application, and therefore depriving them of individual freedom and equality.<sup>54</sup> It then turns the state into 'an absolute entity' capable of imposing absolute values or ends at the expense of their opponents even through violent means.<sup>55</sup> Given that it ignores the EoR, autocracy is prone to forge political repression, subjecting members of society to an absolute authority without providing remedies for the AoH. In the context of 'the awakening of *the self*' facilitated by modernity, this repression of political sentiments and values without remedies is likely to breed dissatisfaction against the regime among repressed interests, thus triggering resistance and exacerbating the PCLD.<sup>56</sup>

#### ***4.2 Schmitt and the EoC: political romanticism and political absolutism***

Here, Schmitt's approach to politics must be read in combination with a political faction with which he was affiliated. He joined first the conservative reactionary movement led by von Papen and von Schleicher, and later the Nazis, though he previously saw Hitler as a threat to the state and the rightist-conservative aristocrats. Schmitt believed that the abolition of the German monarchy constituted a state of emergency by diluting the concept of sovereign authority, and shared with right-wing conservative elites a great scepticism about Enlightenment philosophy and liberal-democratic values and institutions, notably the parliamentary system which reflects the polytheism of values and checks and balances,

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<sup>52</sup> Hans Kelsen, 'Who ought to be the guardian of the constitution?: Kelsen's reply to Schmitt' in Vinx (ed)(tr), *The Guardian*, p 195.

<sup>53</sup> Kelsen, 'The Nature', p 72.

<sup>54</sup> Ibid.

<sup>55</sup> Kelsen, *What Is Justice?*, pp 202-203, 206.

<sup>56</sup> Kelsen, *The Essence*, pp 50, 74, 92-96.

supporting instead the nationalist-authoritarian state.<sup>57</sup> His writings, both those written pre- and post-Hitler's rise to power, also consistently show that he did not hesitate to advocate that the Head of State ('HoS') be equipped with extensive emergency powers to suspend and abolish liberal democracy, thus turning him into a strong supporter of the ultra-conservative von Papen's *Preussenschlag* decree. Overall, Schmitt's scepticism about *the iron cage of rationality* fostered by the disenchantment and liberalisation process represents the rightist conservative's standpoint against dealing with the AoH associated with liberalism by turning to what he called *political romanticism*.

To Schmitt, parliamentary democracy advocates *the iron cage of rationality*. Such a cage, he asserted, contributes to the loss of ultimate meaning, and facilitates political romanticism, that is, '[endless] discussions, through a struggle between different opinions', on values and ends with no last words among political parties within Parliament on an equal footing.<sup>58</sup> In a broader perspective, as political romanticism encourages 'the private individual to be his own priest', it then hastens 'a turn towards *the total state*'.<sup>59</sup> Here, the state is turned into 'a scene of the pluralistic division of [every] organized *social* power.'<sup>60</sup> This is prone to become more deeply embedded due to a call for the respect for such pluralism by liberalism itself, which results in the confinement of state authority to pre-ordained rules.<sup>61</sup> By depriving the state of the means essential for preserving its survival against ideologies and groups threatening its genuine fundamental spirit, i.e., political unity, liberalism is prone to breed the PCLD, yet, fails to cope with the AoH associated with it.<sup>62</sup> In short, Schmitt advocated the resolution of the PCLD by setting aside liberal democracy.

Against the backdrop of the PCLD, Schmitt then responded to political romanticism and a turn towards *the total state* created by *the iron cage* by adopting the key elements of Weber's EoC. He embraced the standpoint that the criterion of a good political act here does not rest on respect paid to the responsibility to act in compliance with law, but is guided by 'political vision' or 'ultimate value(s) or good(s)'.<sup>63</sup> Furthermore, by presuming the existence of 'ultimate value(s) or good(s)', it seeks to resolve political conflicts through bringing 'human

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<sup>57</sup> Jeffrey Herf, *Reactionary Modernism: Technology, Culture, and Politics in Weimar and the Third Reich* (CUP 1984), pp 118-121.

<sup>58</sup> Schmitt, 'Pluralism', p 131.

<sup>59</sup> Schmitt, *Political Romanticism*, pp 17-18, 20; Schmitt, *the CoP*, pp 22-23.

<sup>60</sup> Schmitt, 'Pluralism', pp 144, 146 (emphasis added).

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, pp 150, 155.

<sup>63</sup> Max Weber, 'Religious Rejections of the World and Their Directions' in Weber, *From Max Weber*, p 339; Weber, 'Politics', p 120.

behaviour ... into harmony with [such] proper order of values given in the cosmos.’<sup>64</sup> Adopting these key features of Weber’s EoC, Schmitt recrafted the term ‘democracy’ by detaching it from liberal pluralism, and uniting it with dictatorship, thus conceiving of a democratic regime with the strong HoS embodying political unity and capable of exercising extra-normative authority against threats to it known as *the sovereign*.<sup>65</sup> Democracy then presupposes homogeneity and, if necessary, the elimination of heterogeneity.<sup>66</sup> It is this political condition which Schmitt regarded as normal.

#### ***4.3 Weber’s purposive-rational/instrumental type of action***

Kelsen and Schmitt, through the lens of Weber’s ethics of politics, provided competing intellectual reference points *vis-à-vis* the virtues and defects of liberalism and its replacement with dictatorship. For them, what constitutes ‘the norm’ is a regime/political practice which helps pacify the problem of the AoH, while that which precipitates this problem constitutes ‘the exception’. Their works therefore respectively presume or deny liberalism as a prevailing shared norm or value underpinning the state. In a broader perspective, their adoption of one ethic to the exclusion of the other rests on the Weberian *purposive-rational/instrumental* type of action as Kelsen and Schmitt developed their theories according to their *own/solitary* value, and to achieve their preferred/purposive *end*.<sup>67</sup> The next task is to explore the model of constitutional emergencies they advocated or rejected. Thus, apart from considering the scope of the PCLD, we have to explore that of its response—emergency powers.

### **5. The Kelsenian and Schmittian models of constitutional emergencies: institution, legality, law, and the SoE**

As indicated earlier, Kelsen and Schmitt acknowledged that emergency powers in the PCLD are hardly morally neutral, and therefore cannot avoid struggling with the problem of the AoH. Embracing Weber’s definition of politics, they addressed emergency powers in the PCLD by basing their constitutional models on the closed, self-referential system of state authority/institution.<sup>68</sup> That is to say, they similarly relied on the monopoly of, and the attempt to rationalise, political power, and on the *transcendental* possibility for the legal and political order—Kelsen’s concept of *the grundnorm* and Schmitt’s *concept of the political* (‘CoP’)

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<sup>64</sup> Starr, ‘The Structure’, p 409.

<sup>65</sup> Schmitt, ‘Pluralism’, pp 150,155.

<sup>66</sup> Schmitt, *The Crisis*, p 9.

<sup>67</sup> Jürgen Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society* (Thomas McCarthy (tr), Polity Press 1986), pp 279, 281[‘TCA vol.1’]; Weber, *Economy*, p 26.

<sup>68</sup> Jiří Přibáň, ‘Self-Reference of the Constitutional State: A systems Theory Interpretation of the Kelsen-Schmitt Debate’ (2011) 2 Jurisprudence 309, p 325.

respectively—to explain the nature and use of emergency powers in the PCLD. Theoretically, this fundamentally reflects the competing conceptions of ‘institution’ and the SoE.

### ***5.1 Institution and the SoE: the legitimacy of legality vs the radical legitimacy of law***

According to Croce, the term ‘institution’ can be generally defined as an organisation founded ‘to provide public, stable, durable behavioural patterns which are meant to guide human conduct and to mould the social environment.’<sup>69</sup> Two more specific senses of this term can be further derived from such definition. First, it reflects ‘all the beliefs and modes of behavior instituted by the collectivity’.<sup>70</sup> Secondly, it also connotes ‘a specialised instrument belonging to the specialised field of society’.<sup>71</sup> Schmitt’s notion of democracy *qua* homogeneity clearly indicates that he preferred defining ‘institution’ not as ‘a specialised instrument’, but as ‘the basic structure of society independent of its particular members.’<sup>72</sup> By contrast, Kelsen resisted such extra-normative authority in response to the PCLD as he put it: sovereignty only connotes ‘the sovereignty of a legal order’.<sup>73</sup> However, despite following Weber’s EoR that the modern state cannot avoid espousing legal-rational domination—an administration through the medium of impersonal laws enacted and promulgated in accordance with the formal legal process, he saw law not as part of social fact but as a specialised instrument governing its own creation.<sup>74</sup> More specifically, Kelsen and Schmitt each applied their own position on ‘institution’ to address the connection between legality and the SoE.

The term ‘SoE’ appears in Schmitt’s *Political Theology*—in his famous quote: ‘Sovereign is he who decides on the exception.’<sup>75</sup> An analytical reading of this book reveals the two main dimensions from which Schmitt derived such a term—the SoE *qua* the factual circumstance and the SoE with respect to the legal order.<sup>76</sup> I base my analysis here on these dimensions.

At the outset, Schmitt defined the SoE as ‘an extreme emergency’—a *factual circumstance* which threatens ‘the existence of the state order’.<sup>77</sup> The SoE in this sense then

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<sup>69</sup> Mariano Croce, ‘Does legal institutionalism rule out legal pluralism? Schmitt’s institutional theory and the problem of concrete order’ (2011) 7 Utrecht L Rev 42, p 50 [‘Legal institutionalism’].

<sup>70</sup> Emile Durkheim, *The Rules of Sociological Method: And Selected Texts on Sociology and its Method* (W.D. Halls (tr), Free Press 2013), p 15.

<sup>71</sup> Croce, ‘Legal institutionalism’, p 48.

<sup>72</sup> Ibid.

<sup>73</sup> Kelsen, *What Is Justice*, p 281; Cf Schmitt, *Dictatorship*, pp 114-119.

<sup>74</sup> Kelsen, Introduction, p 63; Weber, *Economy*, pp 217-220.

<sup>75</sup> Schmitt, *Political Theology*, p 5.

<sup>76</sup> Kristian Cedervall Lauterbach, *Disaster Law* (Routledge 2014), pp 51-52.

<sup>77</sup> Schmitt, *Political Theology*, pp 6-7, 26.

leads to the norm-exception dichotomy. As I mentioned earlier, the PCLD in Weimar, in Kelsen's and Schmitt's views, constituted an emergency, though Kelsen did not use the term 'SoE'. Yet, they disagreed over what constitutes a high-priority value of the state which helps alleviate the problem of the AoH (i.e. the norm) and its threat (i.e., the exception). What I still have not comprehensively explained is the relationship between the SoE, law, and legality.

Kelsen and Schmitt discussed the SoE as the *presence* in fact of the suspension of *normativism* or *the doctrine of legal imputation*, according to which law functions to bestow 'legality' upon state power, to deal with the PCLD (i.e., the SoE as an extreme situation).<sup>78</sup> Put another way, the SoE, in this sense, designates the *apparent* emptiness (cognition 'is') of normativism (legal 'ought'), in particular, imposed through 'the specific activities'—emergency powers. Also, they similarly strove to address the SoE through the juridical order, i.e., either the legal system or the concrete-order framework. Nevertheless, what they disagree about is the focal role of the doctrine of legal imputation, namely whether any extreme threat to the state's survival necessitating the use of emergency powers involves a deviation from this doctrine.<sup>79</sup> Kelsen and Schmitt addressed this problem differently by relying on *the legitimacy of legality* and *the radical legitimacy of law* respectively.

On the one hand, by conceiving law as 'a specialised instrument', Kelsen proposed a scientific theory of law—the *Pure Theory of Law* ('PTL')—which explores 'what the law is and how [it] is made'.<sup>80</sup> His primary concern is then the clear and constitutive legal order rather than its substantive quality. Thus, Kelsen's primary focus is *the legitimacy of legality*, that is, the process whereby law and thereby decisions in the name of the state are produced, rather than their ultimate legitimate content.<sup>81</sup> For him, there is no SoE which can legitimately lead to the total suspension of law, and extra-normative emergency powers cannot legitimately be imputed to the state. Nevertheless, his position on the connection between legality and the SoE has to be carefully approached as Kelsen spoke of the legal system in terms of a dynamic system of norms. The dynamic system of norms means that while the higher-level legal norm determines the process and sometimes the range of contents, such as the list of non-derogable rights and liberties, by which its lower-level alternative is created, such determination is incomplete—'a range of discretion' based on *political* considerations is still preserved by the

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<sup>78</sup> Hans Kelsen, 'Causality and Imputation' (1950) 61 *Ethics* 1, pp 7-8.

<sup>79</sup> See Aysegül Sabuktay, 'Locating extra-legal activities of the modern state in legal-political theory: Weber, Habermas, Kelsen, Schmitt and Turk' (2009) 51 *Crime Law Soc. Change* 511, pp 516-519.

<sup>80</sup> Kelsen, *Introduction*, p 7 (emphasis added).

<sup>81</sup> David Dyzenhaus, 'The Legitimacy of Legality' (1996) 46 *Univ Tor Law J.* 129, pp 130, 138; Habermas, *Between Facts*, p 86.

higher-level norm for state officials to assert contents of its lower-level counterpart.<sup>82</sup> Acknowledging the impossibility of specifying every detail of law to be put into practice in advance, Kelsen's thesis provides a resource for responses to 'indeterminacy' pertaining to exceptional political incidents. This point also signifies that Kelsen tacitly agreed with Schmitt that emergency legislation is structurally unable completely to anticipate the SoE *qua* an extreme situation, and that its content is partly governed by an area of *penumbral uncertainty*—an area where the law is uncertain/silent and instead governed by 'something extra-legal'.<sup>83</sup> However, the only difference here is that Kelsen sought to contain a penumbra of uncertainty under the umbrella of the doctrine of legal imputation which functions as *a frame* providing *authoritative* force.<sup>84</sup>

On the other hand, Schmitt's theory of law contrasts with Kelsen's positivism, and is based on an anti-liberal form of legal realism. Nevertheless, where the U.S. legal realist tradition (arguably the dominant version) not only argues that 'law is politics' as a matter of fact, but also that law should be liberal politics as a matter of normative commitment, Schmitt is however a realist in quite a distinct sense since he was antagonistic to liberalism.<sup>85</sup> More precisely, he opposed the legitimacy of legality which focuses on *the process*, namely the doctrine of imputation *qua* the basis of emergency powers, and instead celebrated extra-normative emergency authority. Schmitt's support for sovereign decisions, I will more comprehensively explain below, is derived from his notion of 'institution' *qua* the homogeneity of the people. Accordingly, it can be said that Schmitt preferred the legitimacy of law which concerns the legitimate *content* of particular state decisions.<sup>86</sup> However, his version of such legitimacy is anti-liberal and radical because it is applied to justify emergency powers transcending the contents of positive law provisions and legality.<sup>87</sup>

Having explored the competing conceptions of 'institution', the SoE, and the contesting legitimacy between legality and law, I next strive to elaborate the full picture of Kelsen's and Schmitt's models of constitutional emergencies.

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<sup>82</sup> Kelsen, 'Who ought', pp 193-195

<sup>83</sup> Charles Olney, 'Justice and Legitimacy: Rawls, Schmitt and the Normativity of Law' (2016) 12 LCH 49, p 59; HLA Hart, 'Problems of the Philosophy of Law' in HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983), pp 63-64.

<sup>84</sup> Kelsen, 'Science', p 654.

<sup>85</sup> Cf Brian H. Bix, *Jurisprudence: Theory and Context* (7<sup>th</sup> edn, Sweet & Maxwell 2015), p 200; Gross and Ní Aoláin, *Law*, p 11; Oliver Wendell Holmes, *The Common Law* (Dover 1991), p 1.

<sup>86</sup> Dyzenhaus, 'The Legitimacy of Legality', p 130.

<sup>87</sup> See Mariano Croce and Andrea Salvatore, *The Legal Theory of Carl Schmitt* (Routledge 2013), p 13.



## ***5.2 Kelsen's project of authority: the legislative accommodation model of constitutional emergencies***

For Kelsen, who strove to lessen as much as possible the level of violence produced by emergency powers in Weimar through the EoR, liberal democracy and constitutionalism offer the best opportunity for addressing the AoH associated with those powers through *reconciling* the will of the subjects of such powers (subjective value) to the state's *de jure* monopoly of force (objective authority). He therefore applies his theories of law and politics to explain how public order can be maintained by subjecting different interests and values under the same unified order of positive law which constitutes the state regarded as the ultimate point of imputation. Let's call this as *the project of authority* ('PoA').<sup>88</sup>

### ***5.2.1 Kelsen's Pure Theory of Law: the doctrine of legal imputation in application***

Kelsen, I already indicated, regarded dictatorship as creating the risk of unconstrained and violent emergency powers to protect only a limited range of interests. Against Schmitt, the HoS acting as the sovereign cannot justify the exertion of extensive emergency powers by simply claiming that he/she stands above party politics and embodies the homogeneity of the people. Kelsen criticised this for providing no guarantee for the prevention of any abuse of emergency decisions made by such a person.<sup>89</sup> For him, Schmitt's attempt to apply this claim to turn 'the dictator' into 'the guardian of the constitution' also undermines the essence of parliamentary democracy and precipitates a paradox within the constitutional order. Where 'the dictator' may wield emergency powers in such a way that transcends parliamentary rule and violates a written constitution, 'the guardian' performs a role in defending it.<sup>90</sup> By contrast, under the PoA, all branches of government have to cooperate to deal with an exceptional political situation guided by the assumption of constitutionality, while the extra-normative/metaphysical character of emergency powers is denied.<sup>91</sup> This idea is based on his famous PTL. Although Kelsen did not use the term 'PTL' to defend Weimar democracy, its seeds, notably the *is-ought* dichotomy and the ideas of legal hierarchy and constitutional legality, are conspicuous in his critical engagement with Schmitt's ideas. It is also beneficial to assess his debate with Schmitt by simultaneously considering his more developed, post-1932 contributions, notably *the Reine Rechtslehre* and *the General Theory of Law and State*.

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<sup>88</sup> I borrow this term from Loevy. See Loevy, *Emergencies*, p 31.

<sup>89</sup> Kelsen, 'Who ought', pp 181, 208-209.

<sup>90</sup> Ibid, pp 219-220.

<sup>91</sup> See Ibid, p 174.

The PTL emphasises the stringent separation between *cognition/rationality* ('*is*') and *ideal entities* ('*ought*'). In the process, it robustly distinguishes between (a) legal norms which are 'imperatives' or 'commands' and (b) legal '*ought*' which concern 'legal proposition' or a *hypothetical* judgment by which the science of law attributes a 'legal meaning' to particular conduct.<sup>92</sup> The former are prescriptions by the legal authority, while the latter connotes the doctrine of legal imputation which constitutes the validity of legal norms and therefore an *ideal entity* (or extra-cognition) paradoxically originating in *reason*.<sup>93</sup> Put more theoretically, the latter is 'a unified system of legal norms, and thereby the possibility of creating [and describing] *a priori* the object, law, as an object of enquiry in legal science.'<sup>94</sup> Accordingly, where the issuance of legal norms and their content cannot totally be detached from politics or value-judgment, the *objective* realm of legal '*ought*' must be severed from *subjective* values towards whether the content of a law is good-bad, right-wrong, or just-unjust. This means that legal validity is not dependent on moral/value '*ought*' and concrete factuality '*is*', and that legal norms are valid and binding only because they belong to the objective, closed, self-referential system of legal '*ought*'.<sup>95</sup> This '*is-ought*' distinction aims to prevent deriving the validity of law from the ruler's autocratic ability to wield power.<sup>96</sup>

Having thought that the Schmittian position allows the state to encroach upon individual rights and liberties *at will* without prior objective legal authorisation, Kelsen urged that *the identity thesis*—state officials act *qua* state and derive their authority solely from law—must be observed under all circumstances.<sup>97</sup> It therefore follows that he advocated *liberal constitutionalism* which regards a constitution as an essential instrument which establishes institutional mechanisms for controlling state authority in order to protect individual rights and liberties.<sup>98</sup> In this fashion, the PTL then constructs a dynamic system of hierarchical norms whereby 'the higher-level norm governs [the process of creating] the lower-level norm'.<sup>99</sup> Accordingly, all emergency legislation must be issued by a competent official authorised by a higher-level law and must respect the doctrine of imputation. For Kelsen, *the*

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<sup>92</sup> Kelsen, *GTLS*, p 45.

<sup>93</sup> Ibid; See Hans Kelsen, *General Theory of Norms* (Michael Hartney (tr), OUP 1991), pp 96-98; Hans Kelsen, 'The Concept of the Legal Order' (1982) *Am. J. Juris.* 64, p 66 (translated by Stanley L. Paulson).

<sup>94</sup> Gerhard Luf, 'On the Transcendental Import of Kelsen's Basic Norm' in Stanley L. Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press 1998), p 224.

<sup>95</sup> Kelsen, *PTL*, pp 17-20, 72-73, 197.

<sup>96</sup> Kelsen, 'Who ought', p 180.

<sup>97</sup> Kelsen, *Introduction*, pp 100-103.

<sup>98</sup> Carl Lebeck, 'Procedural fairness as constitutional justice: an essay on Hans Kelsen's theory of liberal constitutionalism' (2008) 63 *ZÖR* 559, p 561.

<sup>99</sup> Kelsen, *Introduction*, p 78; Kelsen, 'The Nature', pp 27-28.

*grundnorm* or the basic norm constitutes the ultimate, yet, hypothetical norm which unifies the legal system.<sup>100</sup> However, given that the *grundnorm* is constructed upon ‘the transcendental-logical’ presupposition (and is therefore ‘the constitution in the transcendental-logical sense’), the making and application of emergency legislation, in reality, is ultimately governed by a written constitution which is the most fundamental positive law.<sup>101</sup>

Interestingly, despite recognising ‘indeterminacy’ inherent in the legal system, Kelsen noted in his comment on the *Preussenschlag* judgement that when an emergency provision containing an area of *penumbral uncertainty* is invoked, its application still needs to uphold objective criteria determining the constitutionality of any emergency action, that is, *the basic organisational principles* of a written constitution.<sup>102</sup> Thus, when speaking of legal authorisation, he did not merely speak of a positive law, but also of principles inherent in it. Kelsen believed that a liberal democratic constitution facilitates the strict legal interpretation and application of emergency powers in the PCLD.<sup>103</sup> It also helps set liberal constitutionalism—including the respect-to-rights principle, notably the rights to liberty and autonomy, freedom of expression and political participation, and the essence of political compromise (pluralism and broadmindedness)—as the organizational principle of the constitution and ‘intangible limits’ constraining the use of such powers.<sup>104</sup> Moreover, officials legally authorised to implement emergency measures are required by this type of constitution to adhere to the proportionality principle, in that, they must be applied in accordance with the objective of the higher norms, and in such a way that they can resolve a public emergency without causing excessively onerous effect on individuals.<sup>105</sup>

Overall, Kelsen’s PoA parallels Gross and Ní Aoláin’s *legislative accommodation model of constitutional emergencies* which is premised upon two basic assumptions. First, it emphasises the separation between normalcy and exception—emergency measures must be distinguished from ordinary legal rule.<sup>106</sup> Secondly, it rests on ‘the assumption of constitutionality’ according to which ‘whatever responses are made to the challenges of a particular exigency, such responses are to be found and limited within the confines of the constitution’.<sup>107</sup>

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<sup>100</sup> Kelsen, *PTL*, p 201.

<sup>101</sup> *Ibid*, pp 202-205, 221-223.

<sup>102</sup> Kelsen, ‘the judgment’, pp 230-233.

<sup>103</sup> *Ibid*, p 233.

<sup>104</sup> *Ibid*, p 237.

<sup>105</sup> *Ibid*, pp 234-236.

<sup>106</sup> Gross and Ní Aoláin, *Law*, pp 172-174.

<sup>107</sup> *Ibid*, p 10.

### 5.2.2 *The constitutional court as the guardian of the politics of reconciliation*

To ensure full and practical compliance of emergency powers, especially those ‘immediate to the constitution’, with a liberal democratic constitution, Kelsen further supported the internalisation of constitutional review of Article 48 of the Weimar Constitution by *a centralised constitutional court*. Put more theoretically, he regarded a constitutional court as the guardian of liberal constitutionalism and the politics of reconciliation as its key function is to ensure that emergency powers in the PCLD are not applied to subvert ‘the institutional room for ... mutual respect without committing us to epistemic abstinence and curtailment of public debate.’<sup>108</sup> This thesis is based on the following theoretical ideas. First, it is naïve to expect the legislature or the executive to invalidate an emergency law they themselves have created.<sup>109</sup> This mirrors Kelsen’s strong support for separating the political branches of the government from the judiciary. Judicial impartiality and independence are key instruments, allowing the constitutional court to police the aforesaid full compliance.<sup>110</sup> Yet, and secondly, Kelsen applied his PTL to indicate the impossibility of a sharp separation between legal and political decisions and between adjudication and legislation. Seeing legal ‘ought’ as *a frame*, every judicial decision rendered by the constitutional court, which also constitutes the making of legal norms, is discretionary and political.<sup>111</sup> Due to such inseparability, Kelsen therefore justified the judicialisation of politics, that is, the ‘reliance on courts and judicial means for addressing ... political controversies’, by denying that the role of the constitutional court in policing the constitutionality of emergency powers in the PCLD constitutes the encroachment upon the realm of politics.<sup>112</sup>

For Kelsen, the *Preussenschlag* decree exemplified how an emergency power was exploited during the PCLD to eliminate the principle of liberal democracy. It deprived the government of the Prussian state of its democratic functions, and replaced them with the authority *not* democratically chosen by/from and answerable to the populace, thus inaugurating an authoritarian turn.<sup>113</sup> Furthermore, the *Preussenschlag* decision reflected the court’s failure to adopt the principle of proportionality to examine whether the emergency measure employed by the Federal government exceeded what counted as necessary to resolve the political

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<sup>108</sup> John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (OUP 1991), p 170; Kelsen, ‘The Nature’, pp 44-48, 51; Lars Vinx, *Hans Kelsen’s Pure Theory of Law: Legality and Legitimacy* (OUP 2007), p 170.

<sup>109</sup> Kelsen, ‘The Nature’, pp 44-45.

<sup>110</sup> See Schmitt, ‘Pluralism’, p 165.

<sup>111</sup> Kelsen, ‘Who ought’, p 175.

<sup>112</sup> Ran Hirschl, ‘The New Constitution and the Judicialization of Pure Politics Worldwide’ (2006) 75 *Fordham L Rev* 721, p 721.

<sup>113</sup> Kelsen, ‘the judgment’, pp 230-231, 244.

turmoil.<sup>114</sup> By upholding the constitutionality of the *Preussenschlag* decree yet recognising its potential constraint, Kelsen also criticised the *Staatsgerichtshof* for oscillating ‘between formulations that give a wholly unfettered discretion to the president and formulations that seek, to a greater or lesser degree, to limit that discretion.’<sup>115</sup> Put another way, in his view, this confusing outcome would not have happened, if a full-time constitutional court had been established in Weimar. Besides, Kelsen thought that Article 48 itself reflected the legal-technical deficiency of such a constitution given that it contained ‘a legal space that is obviously too narrow’ due to the presence of its ambiguous wording which granted the Reichspräsident a wide discretion, notably ‘public order/security’, without providing any clear criteria for their interpretation.<sup>116</sup> Apart from a ‘defective’ emergency decree such as the *Preussenschlag* decree, Kelsen suggested bestowing upon a constitutional court an authority to issue a cassation order against acts proclaiming to be the exercise of sovereign decisions which abolished liberal democratic constitutionalism as they are also ‘acts immediate to the constitution’.<sup>117</sup>

### ***5.3 Schmitt’s sovereign authority: the anti-liberal realist model***

Against Kelsen, Schmitt saw *the iron cage* of liberal constitutionalism and political romanticism as unconstitutional, and therefore the source of the PCLD, given that they induce a pluralist fragmentation imperilling the political unity of the state. Embracing the radical EoC, he supported the extensive use of Article 48, including the enactment of the *Preussenschlag* decree, and sought to deal with the AoH associated with emergency powers in the PCLD by advocating the *elimination* of threats to political unity, especially through such powers themselves. However, to understand Schmitt’s politics of exclusion, his theory of law must be first explained.

#### ***5.3.1 Schmitt’s Three Types of Juristic Thought: prioritising concrete factuality over abstract validity***

In general, Schmitt’s theory of law comprises three elements—*normativism*, *decisionism*, and *the concrete-order thinking*. For him, by viewing legal norms merely from the perspective of *normativism*, that is, as a sum of impersonal norms which impose limits on the exercise of state authority, Kelsen misconceived their character.<sup>118</sup> As already mentioned,

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<sup>114</sup> Ibid, p 233.

<sup>115</sup> Ibid, pp 247-249; David Dyzenhaus, ‘Legal Theory in the Collapse of Weimar: Contemporary Lessons?’ (1997) 91 APSR 121, p 127

<sup>116</sup> Kelsen, ‘Who ought’, p 177.

<sup>117</sup> Ibid, p 180.

<sup>118</sup> Carl Schmitt, *On the Three Types of Juristic Thought* (Joseph W. Bendersky (tr), Praeger 2004), pp 48, 52 [‘Three Types’].

Schmitt attacked the EoR underlying the PTL for turning law into a pre-ordained, technical apparatus functioning merely to describe factuality, and eventually equating it with lifeless statutes.<sup>119</sup> More precisely, he asserted that emergency provisions are, in reality, simply ‘a fig leaf of legal justification’ for any invocation of ‘sheer powers’ by the executive, while, on the flip side, rigid and *ex ante* legal constraints prevent state officials from resorting to intrinsically necessary, but not legally prescribed, means for preventing the collapse of a concrete order.<sup>120</sup> He instead advocated ‘mobilization of the forces of ‘life’—the power of political facts and historical ideas over the sober, rational, often seemingly shallow technicality of positivism.’<sup>121</sup> Put simply, Schmitt challenged Kelsen’s PTL, notably its strict separation between cognition and value when describing law, by including two other elements—*decisionism* and *concrete order*.

According to Schmitt, law *qua decisionism* connotes ‘a decision on the political form of the state’, including a measure and an executive decree, i.e., ‘as a matter of political and social forces’ unconstrained by legal statutes.<sup>122</sup> Unlike Weber who, as a liberal, strove to balance the EoC with the EoR (i.e., the legal-rational authority and bureaucracy), Schmitt however combined Weber’s idea of plebiscitary leadership (i.e., a charismatic president directly elected by the people) with Sieyès’s notion of constituent power—the power of the unified collectivity of the people to create the constitution.<sup>123</sup> Schmitt also supplemented his radical version of the EoC with Hobbes’s *Leviathan*—a strong state capable of imposing peace within a polity by bringing its members out of chaos.<sup>124</sup> He saw the state’s ability to protect the aforesaid collectivity as vital—‘if [such] protection ceases the state too ceases’.<sup>125</sup> In brief, to cope effectively with an exceptional political situation, he advocated legislative power united and even subsumed by its executive alternative.<sup>126</sup> In other words, although, like Kelsen, Schmitt recognised the state’s role in protecting individuals, the latter took a contrary position as, for him, the liberal approach inherent in the PTL implies ‘that individuals gain protection

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<sup>119</sup> Croce and Salvatore, *The Legal Theory*, pp 34-35.

<sup>120</sup> Carl Schmitt, *Legality and legitimacy* (Jeffrey Seitzer (tr), DUP 2004), p 10; Clinton L. Rossiter, *Constitutional Dictatorship* (PUP 1948), p 8; Mark Tushnet, ‘Emergencies and the Idea of Constitutionalism’ in Mark Tushnet (ed), *The Constitution in Wartime: Beyond Alarmism and Complacency* (DUP 2005), p 49.

<sup>121</sup> Arthur Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (Belinda Cooper (tr), UC Press 2000), p 47.

<sup>122</sup> Dyzenhaus, ‘The compulsion’, pp 37-40; Schmitt, *Political Theology*, pp 31-35; Sylvie Delacroix, ‘Schmitt’s Critique of Kelsenian Normativism’ (2005) 18 *Ratio Juris* 30, p 33.

<sup>123</sup> Max Weber, ‘The President of the Reich’ in Weber, *Political Writings*, p 308; Schmitt, *Dictatorship*, p 121.

<sup>124</sup> Hobbes, *Leviathan*, p 118.

<sup>125</sup> Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (George Schwab and Ema Hilfstein (trs), Greenwood Press 1996), p 72.

<sup>126</sup> *Ibid*, p 71.

from the state but escape the responsibilities they should have towards the state.’<sup>127</sup> Thus, by giving priority to the state over its subjects, individual rights and freedoms, and even liberal democracy, can be extensively compromised and suspended during a political crisis in order to protect political unity.<sup>128</sup>

Prioritising ‘concrete factuality’ and ‘an authoritarian interventionist state’ over ‘abstract validity’, Schmitt recrafted Weber’s plebiscitary leader into *the sovereign* capable of setting normativism aside in an emergency and political crisis especially one created by pluralism entailed by liberalism.<sup>129</sup> Combining plebiscitary leadership with constituent power, Schmitt’s sovereign is however a mere representative and delegate of the true sovereign—*the sovereign people* standing prior to a written constitution, and thus constituting the unity of a state which is the ultimate concrete order understood as *the constitution in the absolute sense*.<sup>130</sup> The sovereign is entrusted by the sovereign people to release the latter from *the iron cage* in times of crises by using modern ideas, notably the concepts of a modern state and democracy.<sup>131</sup> Such authority is premised on the ability to ‘represent the invisible’, i.e., the unity of the people.<sup>132</sup> As the embodiment of political unity, the sovereign is then capable of making the following legal and legitimate decisions in the name of the state, namely: (a) whether a situation counts as the PCLD; and (b) whether emergency powers should be invoked to resolve it.<sup>133</sup>

This stance of decisionism leads to the (mis-)conclusion by some liberal scholars such as Dyzenhaus, Greene, and Kennedy that Schmitt preferred placing emergency powers *outside* the law.<sup>134</sup> Gross and Ramraj even conclude that Schmitt advocated the total divorce of emergency powers and the legal order.<sup>135</sup> By contrast, Agamben argues that Schmitt strove to place the sovereign’s decisions *within* the juridical order because he tied them to ‘the problem of the SoE’ or an extreme emergency situation which raises the question of whether the

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<sup>127</sup> Qi Zheng, *Carl Schmitt, Mao Zedong and the Politics of Transition* (PalgraveMacmillan 2016), pp 56-57.

<sup>128</sup> See Schmitt, ‘Pluralism’.

<sup>129</sup> Ibid, pp 5, 7, 13-14; John P. McCormick, ‘Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law During Crises of the State’ (1997) 9 YJLH 297, p 305.

<sup>130</sup> Schmitt, *Constitutional Theory*, pp 59-60, 240; Schmitt, *Dictatorship*, p 118.

<sup>131</sup> Dyzenhaus, *Legality*, pp 14-15.

<sup>132</sup> Carl Schmitt, *Roman Catholicism and Political Form* (G.L. Ulmen (tr), Greenwood 1996), p 52.

<sup>133</sup> Schmitt, *Political Theology*, p 7.

<sup>134</sup> David Dyzenhaus, ‘The state of emergency in legal theory’ in Victor V. Ramraj, Michael Hor, and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (CUP 2005), pp 70-71, 77; Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (DUP 2004), p 78; Greene, *Permanent States of Emergency*, pp 65-66.

<sup>135</sup> Oren Gross, ‘The Normless and exceptionless exception: Carl Schmitt’s theory of emergency powers and the “norm-exception” dichotomy’ (2000) 21 Cardozo L. Rev. 1825; Victor V. Ramraj, ‘The emergency powers paradox’ in Victor V. Ramraj and Arun K. Thiruvengadam (eds), *Emergency Powers in Asia* (CUP 2010), p 24 [‘EPP’].

constitution should be suspended to resolve this problem, thus defining ‘the threshold of the law’.<sup>136</sup> Notwithstanding their different views on the relation between the sovereign and the juridical order, these scholars however all think that the invocation of emergency powers in the PCLD in Schmitt’s view does not stem from law, but is a pure political matter. They accordingly fail to distinguish between the liberal and concrete order perspective of law, or more precisely, between the legitimacy of legality and the legitimacy of law. Schmitt had recognised this distinction in his justification for the *Preussenschlag* decree where he sought to derive the legality of emergency decisions from the *existential* unity of the people, but clearly used the term ‘concrete order’ in his *On the Three Types of Juristic Thought* published in 1934.

For Schmitt, emergency decisions which contravene constitutional/legal provisions do not stem from nothingness or a political vacuum, but from the institution qua *the concrete-order thinking* which connotes ‘a *standardized* conduct that the members of a social group ... [expect] to maintain’ as the ethos of that society.<sup>137</sup> From the perspective of this concrete-order thinking, ‘extra-normative’ emergency powers are therefore not ‘extra-legal’.<sup>138</sup> In his view, the state *qua* the unity/homogeneity of the sovereign people is the ultimate concrete order and its legal substance—an institution which must be stabilised and protected to ensure the security and continuity of a communitarian life.<sup>139</sup> Put simply, the decisions mentioned deriving their authority from law *qua* the concrete order then function as ‘the custodian of social reality and as a condition of possibility for institutions to subsist and flourish.’<sup>140</sup> They are therefore a selective tool that excludes practices considered to threaten the survival of the state.<sup>141</sup>

### 5.3.2 *The HoS as the guardian of the politics of exclusion*

As we have seen, Schmitt connected democracy with Weber’s plebiscitary leadership, or more precisely, dictatorship, and accordingly replaced liberal pluralism with the concept of the political (‘CoP’), which concerns how politics within the state is defined. Here, the distinction of political *friends* from *enemies* is the core basis for his concrete-order thinking which constitutes the political unity of the state *qua* the situation of normality and, in turn,

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<sup>136</sup> Giorgio Agamben, *State of Exception* (Kevin Attell (tr), UCP 2005), p 36 [‘SoE’].

<sup>137</sup> Leila Brännström, ‘Carl Schmitt’s definition of sovereignty as authorized leadership’ in Matilda Arvidsson, Leila Brännström and Panu Minkinen (eds), *The Contemporary Relevance of Carl Schmitt: Law, Politics, Theology* (Routledge 2016), pp 22-28; Mariano Croce and Andrea Salvatore, ‘Normality as social semantics. Schmitt, Bourdieu and the politics of the normal’ (2017) 20 EJST 275, p 281; Martin Loughlin, ‘Politonomy’ in Meierhenrich and Simons (eds), *The Oxford Handbook of Carl Schmitt*, p 579; Martin Loughlin, ‘The concept of constituent power’ (2014) 13 EJPT 218, p 227.

<sup>138</sup> Giacomo Marramao, ‘The Exile of the Nomos: For a Critical Profile of Carl Schmitt’ (2000) 21 Cardozo L. Rev. 1567, p 1572.

<sup>139</sup> Schmitt, *Three types*, pp 52, 57.

<sup>140</sup> Croce and Salvatore, *The Legal Theory*, pp 4, 34.

<sup>141</sup> *Ibid.*



defines the CoP.<sup>142</sup> The two concepts together presuppose *the democratic conception of equality* and *the existential concept of constitution*.<sup>143</sup> Under the democratic conception of equality, a genuine equality does not lie within an equal right to political participation. Instead, insofar as everyone holds ‘a similar quality of belonging to a *demos*’, they are all genuinely equal.<sup>144</sup> Meanwhile, for Schmitt, Kelsen *relativised* the constitution by treating every provision of a written constitution as a constitutional provision, and was therefore unable to explain the *substantive* task of the constitution, that is, in terms of the inherent homogeneous quality of the people.<sup>145</sup> Ultimately, we can describe Schmitt’s version of democracy *qua* homogeneity as *the identitarian version of democracy*, according to which the aforesaid homogeneous quality helps bind the people as one, and therefore fosters the unified will of the people—the community of friends or the state—as distinct from their political enemies, which represents the genuine and existential constitution or the constitution in the absolute sense.<sup>146</sup>

For Schmitt, political enemies are ‘public enemies’ posing threats to the homogeneity of a state classified as an emergency.<sup>147</sup> This notion therefore links political unity and the existential constitution of a state with ‘the *jus belli*, i.e., the *real possibility* of deciding in a concrete situation upon the enemy and the ability to fight him with the power emanating from the entity.’<sup>148</sup> Overall, two types of political enemies exist for Schmitt. The first type is an enemy in the *institutional* sense which concerns a regime or structure to be opposed. As a reactionary conservative, Schmitt deemed liberal pluralism to be an enemy in this sense. Given its preference for dehumanised legality, openness, and equal opportunity, he saw this regime as inviting antagonisms among self-interested, egotistic, politicians—leading to disagreements, crises and eventually disunity, yet, limits the state’s *factual* authority necessary for protecting itself from such fragmentation.<sup>149</sup> It even leaves open the possibility that emergency legislation is exploited by enemies in the second sense to subvert a concrete order. The second type of enemy is an enemy in the *concrete* sense which concerns ‘the others’ or ‘the strangers’, that is, a collectivity of people holding substantive qualities, including a political ideology, posing a threat to the homogeneous medium and therefore the continuity of a homogeneous political

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<sup>142</sup> Mariano Croce and Andrea Salvatore, ‘Ethical Substance and the Coexistence of Normative Orders’ (2007) 36 J. Leg. Plur. 1, p 5; Schmitt, *The CoP*, pp 114, 116.

<sup>143</sup> Schmitt, *Three types*, pp 78-79, 88.

<sup>144</sup> Schmitt, *Constitutional Theory*, p 258.

<sup>145</sup> *Ibid*, pp 4-5.

<sup>146</sup> *Ibid*, pp 59-64, 382.

<sup>147</sup> Schmitt, *The CoP*, pp 27-28, 34, 38, 71.

<sup>148</sup> *Ibid*, p 45 (emphasis added).

<sup>149</sup> Dyzenhaus, ‘Legal Theory’, p 125.

unity.<sup>150</sup> This second sense, to an anti-liberal like Schmitt, encompasses pro-democracy or other leftist movements.<sup>151</sup> Connecting the friend-enemy dichotomy with his anti-political romanticism, the term ‘the people’, for Schmitt, does not connote ‘active reasonable citizenry’ possessing, in principle, untrammelled freedoms, but instead refers to ‘passive people’ who hold the obligation not to exercise ‘their right to resistance’ against the state.<sup>152</sup> Consequently, anyone questioning state authority implicitly declares himself as an enemy.<sup>153</sup>

Importantly, to Schmitt, this idea of political homogeneity helps tackle the AoH associated with emergency powers in the PCLD on a more permanent footing. He denied the jurisprudence of the *Staatsgerichtshof* in the *Preussenschlag* case, or more generally, the PoA on two main grounds. At the outset, by subsuming the concept of crisis, which is ‘unpredictable’ by nature under legal jurisdiction, Schmitt believed that this would embroil a constitutional court in making *political* decisions, a function different from the application of legal norms, thus resulting in the politicisation of the judiciary, violating the separation of powers.<sup>154</sup> Meanwhile, Schmitt’s second arguments against Kelsen are premised on their different conceptions of democracy and constitution. The attempt to reconcile the AoH under the umbrella of liberal democracy clearly perpetuates a pluralistic disintegration.<sup>155</sup> Besides, by supporting a constitutional court’s role in making political decisions related to the PCLD, which concerns the survival of a social order as a whole, Schmitt indirectly criticised Kelsen’s approach for letting a legal organ, which does not represent the unity of the people, usurp the constituent power.<sup>156</sup> To ensure this unified will, Schmitt advocated emergency powers wielded by the sovereign to distinguish friends from enemies. Regarding the people as the true sovereign in a modern, disenchanted society, the remaining question is *who* Schmitt regarded as *its* representative.

As I briefly mentioned, Schmitt regarded the HoS, the Weimar Reichspräsident, as the guardian of the constitution—a status which constitutes the basis for bolstering their sovereign authority—given the quality of a *pouvoir neutre*, i.e., the quality of one who stands above party politics in Parliament.<sup>157</sup> However, he did not speak of the guardian of the constitution as the

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<sup>150</sup> Schmitt, *The CoP*, p 28.

<sup>151</sup> Dyzenhaus, ‘The state of emergency’, p 71.

<sup>152</sup> Schmitt, *Legality*, p 29; Schmitt, *The Leviathan*, p 56.

<sup>153</sup> Lars Vinx, ‘Carl Schmitt’s defence of sovereignty’ in David Dyzenhaus and Thomas Poole (eds), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (CUP 2015), p 116.

<sup>154</sup> Carl Schmitt, ‘The guardian of the constitution: Schmitt’s argument against constitutional review’ in Vinx (ed)(tr), *The Guardian*, p 116.

<sup>155</sup> Ibid, pp 122-124.

<sup>156</sup> Schmitt, ‘Pluralism’, pp 149-150.

<sup>157</sup> Ibid, p 151.

guardian of liberal constitutionalism, but the Reichspräsident as the guardian of political homogeneity.<sup>158</sup> For him, the Reichspräsident was a *pouvoir neutre* due to three main qualities: neutrality, stability and democratic mandate. Initially, the Reichspräsident was neutral with respect to party politics as he was not an MP or derived his power from the Reichstag.<sup>159</sup> Nor was his status as the HoS terminated by dissolution of Parliament.<sup>160</sup> Nevertheless, although he was independent from parliamentary party politics, he did not have ‘non-political political independence’ as his constitutional authority was based on his capacity to embody the people *qua* political friends.<sup>161</sup> The German Reichspräsident could claim the latter capacity because he was directly elected.<sup>162</sup>

Applying the above qualities, Schmitt turned the guardian into the sovereign who embodies the homogeneity of the people.<sup>163</sup> Although the Reichspräsident was directly elected by the people, the friend-enemy dichotomy, as mentioned earlier, limits the role of the people merely to *acclaiming* the president. Schmitt later radicalised this thesis after Hitler rose to power. Rather than underlining ‘direct election’, he more rigorously emphasised the homogeneous people’s acclamation as the basis of the *Führer*’s sovereign authority.<sup>164</sup> This radical turn was used to justify Hitler’s murders and other suppressions of non-Nazi conservatives, communists, Jews, and social democrats through emergency powers together with the total abolition of the fictions of liberal democracy in Weimar after *the Preussenschlag*, as sovereign decisions necessary for defending national homogeneity.<sup>165</sup> Notwithstanding such radicalisation, Schmitt maintained his conclusion that political exclusion through sovereign authority is essential for resolving the AoH associated with emergency powers in the PCLD given its aim of ensuring the homogeneity of friends by excluding political enemies, in particular, liberal democracy which intensifies the AoH and individuals who oppose substantive merits of state authority, including emergency powers.<sup>166</sup>

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<sup>158</sup> Lars Vinx, ‘Carl Schmitt and the problem of constitutional guardianship’ in Arvidssen and others (eds), *The Contemporary*, pp 41-44 [‘The problem’].

<sup>159</sup> Schmitt, ‘Pluralism’, pp 157-158, 167.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid, p 169.

<sup>162</sup> Ibid, p 172.

<sup>163</sup> Kelsen, ‘Who ought’, p 180; McCormick, ‘The Dilemmas’, pp 175-176; Michael Head, *Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt* (Routledge 2016), p 119; Schmitt, *Legality*, pp 70-71.

<sup>164</sup> See Peter Caldwell, ‘National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate over the Nature of the Nazi State, 1933-1937’ (1994) 16 Cardozo L. Rev. 399, pp 409-411.

<sup>165</sup> Carl Schmitt, ‘Der Führer schützt das Recht’ [1934] Deutsche Juristen-Zeitung 945.

<sup>166</sup> Lars Vinx, ‘The incoherence of strong popular sovereignty’ (2013) 11 I•CON 101, p 109.

## **6. Key theoretical assumptions and asymmetry in Kelsen's and Schmitt's models**

Having described the contours of the Kelsenian and Schmittian constitutional emergency models, our next task is to identify the assumptions underlying both. I do so primarily by reconsidering the methodology employed by Kelsen and Schmitt to construct their arguments. Understanding these assumptions is important for identifying the asymmetry inherent in the Kelsen-Schmitt debate.

### ***6.1 The assumptions underpinning the PoA***

As obvious, Kelsen constructed his constitutional emergency model by combining his PTL and his political writings on liberal democracy, using them to contest Schmitt's sovereign decisionism and his CoP. However, this 'antagonistic' methodology rests on a much more profound institutional structure and ethos than appears on the surface. I argue that the synthetic reading of Kelsen's theories, which may be applied to construct the PoA, reflects the paradoxical relationship between his positions as a legal and political scientist. As a legal theorist, Kelsen intended the PTL to be a *general* theory of legal authority applicable to every political regime.<sup>167</sup> Yet, as a pro-democracy theorist, this theory is *relative* given that he preferred liberal democracy to autocracy in realising the identity thesis and therefore the PoA. It is only through a comprehensive understanding of such a paradox that we can identify assumptions underlying Kelsen's PoA and comprehend why they need to be presupposed. This requires us to shift our reconsideration of Kelsen's grundnorm from the issue of its transcendental status as do most scholars to that of its application in reality in the context of emergency powers in the PCLD.<sup>168</sup>

According to the PTL, the grundnorm provides rules governing the making and the objective validity of lower-level legal norms, and unites them under a unified legal system.<sup>169</sup> Underlining a strict 'law-politics' separation, Kelsen therefore regarded the grundnorm and other lower-level legal norms as 'a frame' to be filled by 'politics'.<sup>170</sup> Regarding the basic norm as a hypothetical norm/a form of thought, it is then for the supreme positive law—the written constitution—to express a state's formal governing regime, which can be either democratic or autocratic.<sup>171</sup> The PTL however is not concerned with why a particular regime is chosen, and

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<sup>167</sup> Kelsen, *Introduction*, p 7.

<sup>168</sup> See Carsten Heidemann, 'Facets of 'Ought' in Kelsen's Pure Theory of Law' (2013) 4 *Jurisprudence* 246; Robert Alexy, 'Hans Kelsen's Concept of the 'Ought'' (2013) 4 *Jurisprudence* 235.

<sup>169</sup> Kelsen, *PTL*, p 197.

<sup>170</sup> *Ibid*, pp 150-151.

<sup>171</sup> *Ibid*, pp 200-202.

how it is established, which are *political* matters by nature. It is through this approach that Kelsen, as a jurist, crafted his general theory of law/legal authority.

Due to the aforesaid separation, emergency legislation containing authoritarian elements is still valid under the PTL, if prescribed in accordance with higher-level legal norms.<sup>172</sup> This approach, in effect, also recognises the validity of an authoritarian military coup, if it successfully overthrows an incumbent basic norm and establishes a new one and therefore a new legal order which are, by and large, effective.<sup>173</sup> Dyzenhaus and Caldwell accordingly share with Schmitt that Kelsen's *grundnorm* confuses the relation between normativism/positivism and decisionism/realism, in that, while it is interpreted as the ultimate point of legal imputation, the content of such a norm itself is determined by a fact.<sup>174</sup> This Kelsenian approach would then fail to prevent the *Preussenschlag* and the later Nazis takeover due to its inability to distinguish qualitatively between the legal order of liberal democracy and that of autocracy since the choice of a political regime is a political decision unanswerable by reference to law.<sup>175</sup>

Here, a conflict between Caldwell's and Dyzenhaus's comments on the one hand and Kelsen's attempt to defend his PTL as a general legal theory on the other leads to two radical suppositions. Adopting the former, *political relativism* as advocated by Kelsen would be merely assumed as the worm in his apple rather than a useful means for reconciling the AoH associated with emergency powers in the PCLD. However, if reading the PTL in tandem with its political alternative in such a way that liberal democracy is seen as an ultimate value and end, this would obviously run counter to Kelsen's intention to create a general theory of law. The synthetic reading of Kelsen's legal and political theories, I argue, makes most sense if it is understood as the balance between the two readings, and only through such a balance can we identify the assumptions the PoA presupposes and why.

Given that we cannot avoid conceding that the choice of a political regime and how emergency authority should be structured are political matters, what I instead propose is the need stringently to recapture the distinction between a *defective* regime and an *ideal* one—between Kelsen's distaste and what he anticipated. An autocratic legal system and authoritarian coups establishing such a system should be read with reference to Kelsen's theory as a

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<sup>172</sup> Ibid, p 198.

<sup>173</sup> Ibid, p 209; Kelsen's theory was exploited by coup groups in many developing nations. See Tayyab Mahmud, 'Jurisprudence of Successful Treason: Coup d'Etat&(and) Common Law' (1994) 27 Cornell Int'l L.J. 49.

<sup>174</sup> Schmitt, *Political Theology*, pp 19-20.

<sup>175</sup> Caldwell, *Popular Sovereignty*, pp 117, 119; Dyzenhaus, *Legality*, p 159.

downside of the failure to respect the identity thesis.<sup>176</sup> They connote ‘defective instances’ that a legal system is exploited/overthrown to subvert ‘the claim to obedience on the basis of a claim to legality.’<sup>177</sup> However, though regarding liberal democracy a necessary condition for enabling the PoA to flourish, a strict ‘*is-ought*’ separation prevents Kelsen from elaborating in his legal theory the *political* conditions which facilitate liberal constitutionalism. Owing to this limit, he then had to make the following *assumptions*.

As mentioned, for Kelsen, the identity thesis is a focal point of his whole project. He had to assume that emergency officials accept that any exercises of emergency powers or of state authority related to such powers can only be justified by a commitment to democratic constitutionality. Without ‘the normative priority of legality’s autonomous value’ or ‘the legitimacy of legality’ and the belief in ‘democratic values’ notably pluralism, tolerance and broadmindedness, the PoA is fictitious.<sup>178</sup> The ‘*is-ought*’ separation further means that he, as in his lucid comment on the *Preussenschlag* decision, had to presume the ‘technical sufficiency’, that is, a democratic constitution which includes the unambiguous conditions for limiting rights and freedoms, in particular, those necessary for democratic politics mentioned earlier, which establishes an independent constitutional court with full competence to quash any emergency action undermining liberal democracy.<sup>179</sup> Yet, given that constitutional conflicts concern the judicialisation of politics and affect pluralistic interests within society, judicial independence, for Kelsen, does not mean the total separation of the appointment of judges from politics. Instead, he maintained that Parliament, political parties and the executive should compete for nominating and selecting constitutional court judges, seeing this as part of building compromise and preventing ‘authoritarianism’ within society.<sup>180</sup> Kelsen also presumed that constitutional court judges understand their role as guardians of the constitution. That is, they are expected to take a robust stance in rejecting legally unbounded emergency discretion, and to defend liberal democracy by taking the restrictive interpretation of emergency action bearing in mind the primacy of individual freedom over its restriction, yet, are simultaneously required not to stray into the realm of policy-making by replacing executive discretions with their own.<sup>181</sup> By ruling that the *Preussenschlag* decree was justified as a means

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<sup>176</sup> Péter Sólyom, ‘Between Legal Technique and Legal Policy: Remarks on Hans Kelsen’s Constitutional Theory’ [2017] Can J Law Jurisprud. 399, p 410.

<sup>177</sup> Vinx, *Hans Kelsen*, pp 211, 216.

<sup>178</sup> Ibid, p 31.

<sup>179</sup> Kelsen, ‘the judgment’, pp 251-252.

<sup>180</sup> According to Kelsen, the state might designate the executive to nominate names of the judges to be later elected by Parliament. See Kelsen, ‘The Nature’, p 72.

<sup>181</sup> Kelsen, ‘the judgment’, pp 252-253.

to restore public order, yet, could not be exploited permanently to compromise the Prussian state's autonomy, Kelsen criticised the *Staatsgerichtshof* for failing to meet this expectation as the judges left the opportunity for the exercise of a wholly unfettered discretion by the Prussian commissioner.<sup>182</sup>

Overall, the successful implementation of the PoA assumes a stable, entrenched democracy, with liberal-democratic institutions, a commitment to liberal democratic constitutionalism and political compromise among competing political interests as its dominant culture and ethos.

### ***6.2 The assumptions underpinning Schmitt's preferred model***

As discussed, Schmitt's constitutional emergency model combines sovereign authority, in particular, the SoE, with the CoP. He intended permanently to sustain the friend-enemy dichotomy in order to facilitate the sovereign's emergency powers to suppress its enemies and create a pacified political unity. However, as in the case of Kelsen, we should be careful when approaching this issue. Schmitt linked the terms 'friends' and 'enemies' generally to 'a substantial sameness of themes or issues having a political significance.'<sup>183</sup> In other words, they are concerned with 'a homogeneity from the perspective of one crucial point that constructs political identity and provides the basis for order', thus still leaving some space for pluralism.<sup>184</sup> The friend-enemy dichotomy, to Schmitt, is then a basis on which *all* political action and motives are based.<sup>185</sup> Thus, these terms neither concern the 'intrinsic political ideal', that is, *why* or *for what political reason* particular individuals commit themselves to a 'homogeneous medium', nor are they specifically affiliated with a particular political regime.<sup>186</sup> Yet, as a staunch anti-liberal, he connected them with the state, and strove to apply the CoP to undermine liberal parliamentary democracy. Like Kelsen, he then had to distinguish between the *ideal* and *defective* regime.

Clearly, for Schmitt, liberal democracy is defective. From the perspective of the CoP, it is defective because the type of homogeneity it entails is that of 'market-oriented egotistic and hedonistic human beings'.<sup>187</sup> Such homogeneity is self-destructive because it results in political romanticism and 'a turn towards the total state', having equated a state's general will

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<sup>182</sup> See Dyzenhaus, *Legality*, p 124.

<sup>183</sup> William E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (The MIT Press 1997), p 23.

<sup>184</sup> Croce and Salvatore, *The Legal Theory*, p 172; David Pan, 'Carl Schmitt on Culture and Violence in the Political Decision' [2008] *Telos* 49, p 70.

<sup>185</sup> Schmitt, *The CoP*, p 26.

<sup>186</sup> Cf Rawls, *Political Liberalism*, p xlv.

<sup>187</sup> Dyzenhaus, *Legality*, pp 38-39.

with mere competing antagonisms among self-interested, egotistic party interests entering politics for private gain.<sup>188</sup> Nevertheless, to Schmitt, liberal democracy is also self-contradictory given that where it regards autocracy as its opposition, attaching elements of ‘political’ and ‘sovereign decisionism’ to liberal democracy to enable it to assert its own truth, it contradicts the liberal ethos of compromise and reconciliation.<sup>189</sup> Put simply, he believed that liberal democracy in Weimar failed because it ‘[shuttled] back and forth between these [two] alternatives.’<sup>190</sup> Moreover, while Kelsen retained his faith in the ability of ‘normativism’ to constrain emergency powers and of the Constitutional Court to reconcile the AoH associated with them in the PCLD, the realisation of Schmitt’s model rests on the assumption that a normatively-bound response to emergency powers hampers the use of extra-normative measures necessary for resolving the PCLD and presupposed the politicisation of the judiciary.

Regarding political romanticism as the source of the PCLD and given his scepticism about the normatively-bound response to emergency powers and the politicisation of the judiciary, the initial presumptions underlying Schmitt’s thesis are therefore the presupposition of the political and the view that politics has to perpetually engage in *jus belli* given that any liberal effort to make it peaceful and safe would ultimately result in ‘a turn towards the total state’.<sup>191</sup> Yet, as this would constitute the antithesis of liberal democracy, the meaningful implementation of his theory has also to presume the presence of concrete media, notably ideology, myth, and belief, which help construct ‘an *anti-liberal* democracy based upon *homogeneity* directed by a dictatorial power’, also defining who belongs to such a group and who are to be excluded.<sup>192</sup> In reality, Schmitt’s presumptions were fully and forcefully actualised by the Nazis, and he opted for Hitler rather than the chaos he believed stemmed from Weimar’s liberal and parliamentary fictions.<sup>193</sup>

### ***6.3 Individualism/collectivism, scepticism, and hostility: the Weberian straight-line and the theoretical asymmetry in the Kelsen-Schmitt debate***

Now, to identify the asymmetry inherent in the Kelsen-Schmitt debate, I have to conclude the connection between the above assumptions underlying their theses and the basis of each constitutional emergency model—the ‘*is-ought*’ distinction. Apparently, the above

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<sup>188</sup> Schmitt, *The CoP*, pp 69-72.

<sup>189</sup> Ibid.

<sup>190</sup> Dyzenhaus, *Legality*, p 39.

<sup>191</sup> Schmitt, *The CoP*, pp 19, 22.

<sup>192</sup> Claudio Minca and Rory Rowan, *On Schmitt and Space* (Routledge 2016), p 32 (emphasis added); Thalín Zarmanian, ‘Carl Schmitt and the Problem of Legal Order: From Domestic to International’ (2006) 19 LJIL 41, p 53.

<sup>193</sup> Head, *Emergency Powers*, pp 114-127.



assumptions reflect the instrumental role of the *grundnorm* and the CoP in determining the relation between ‘*is*’ and ‘*ought*’ together in each constitutional emergency model.

On the level of authority ‘*is*’, the *grundnorm* ensures that emergency norms are abstract entities within the ideal realm of legal ‘*ought*’, thus only created by legally-authorised officials and deriving their validity from a higher-level norm. Kelsen believed that by conceiving legal ‘*ought*’ as the category of imputation, emergency authority in the PCLD is committed to the identity thesis. On the other hand, the CoP is premised on concrete-order thinking, and embodies the closed, self-referential system of politics, thus ultimately functioning to replace the Kelsenian version of the ‘*is-ought*’ distinction with ‘*is*’ and ‘*not-is*’ (i.e., the friend-enemy dichotomy).<sup>194</sup>

In a broader perspective, it follows that both the aforesaid ‘*is-ought*’ separation and fusion are based on value ‘*ought*’—the liberal-democratic and anti-liberal value espoused by Kelsen and Schmitt respectively. The *grundnorm* and the CoP are the transcendental category *qua* the channel through which the preferred value of the closed, self-referential system is *presupposed*. Accordingly, the realisation of the PoA and the anti-liberal realist model is grounded in what I call *the Weberian straight-line*, that is, Weber’s distinction between ideological goal (value ‘*ought*’) and means to realise it (‘*is*’) which comprises two elements—authority and interest. As discussed in Section 2, the imposition of state authority, according to Weber, involves the straight-line, that is, the endorsement or rejection of value which exists because an interest in a particular object exists. The presumption of the value that makes Kelsen’s PoA and Schmitt’s realist model effective, put simply, is then derived from an interest or disinterest in liberal constitutionalism and democracy.

From the above, I speak of Kelsen and Schmitt *qua* jurists/theorists. In this capacity, to repeat, both scholars embraced Weberian instrumental rationality, and each developed and defended their *own* line of arguments and assumptions and considered them an appropriate legal and political basis for the use of emergency powers in the PCLD in the Weimar Republic. Their positions, I argue, can therefore be explained through the normative perspectives—*individualism/collectivism, scepticism, and hostility*. I modify the two latter terms used by Steven Greer to identify contemporary normative perspectives on human rights.<sup>195</sup>

Since Kelsen believed that *ex ante* legal authorisation and philosophical relativism which presume individuals as equal and rational beings whose rights and freedoms help prevent

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<sup>194</sup> Paulson, ‘Hans Kelsen and Carl Schmitt’, p 510.

<sup>195</sup> Steven Greer, ‘Being “realistic” about human rights’ (2009) 60 NILQ 147.

absolutism and realise the politics of compromise, I consider this Kelsenian project *individualist*. This normative perspective reflects an idealistic endorsement as the realisation of the PoA depends on valuing ‘the normative priority of legality’s autonomous value’ and ‘the politics of reconciliation’ which assumes an individual as ‘the creator of his world’, and, on the flip side, adopts the stances of *scepticism* and *hostility* towards autocracy.

By contrast, Schmitt’s attitude towards the relationship between liberal democracy and constitutionalism shifts from *scepticism* to *hostility*, that is, from their ‘partial endorsement’ to ‘total rejection’. I use the term ‘shift’ because Schmitt, on the one hand, did not totally reject ‘the basic organisational structure’ of liberalism, notably the modern state, popular sovereignty, the concept of the constitution, *per se*, but sought to reinterpret them ultimately to serve his anti-liberal realist project. As Seitzer describes, his technique symbolises ‘a neutron bomb which destroys life but leaves untouched the structures that house it.’<sup>196</sup> On the flip side, this shift simultaneously reflects its own version of *collectivism*, i.e., that the realisation of the anti-liberal realist ideology requires valuing it based on ‘disinterest’ in liberal democracy and the radical form of communitarianism, namely the CoP).<sup>197</sup>

Nevertheless, the Kelsen-Schmitt debate also represents raw conflicting interests and values (both material and symbolic) in the PCLD between those denying and advocating liberal ideal. In case of the *Preussenschlag*, their arguments provided a theoretical support for the Prussian social democrat government (Kelsen) and von Papen’s emergency decree (Schmitt). This eventually results in the theoretical asymmetry between ‘Kelsen and Schmitt as jurists/theorists’ and ‘Kelsen and Schmitt as representatives of raw conflicting interests’. The former is static, while the latter is dynamic, in that, where the theoretical conflict connotes both jurists’ *solitary* adoption of the Weberian straight-line to *refute* each other’s arguments, its ideological alternative reflects the *contestation* and *collision* between liberal and anti-liberal views on law and politics. It is hardly possible that supporters of each constitutional emergency model would *fully* endorse its opposite as the primary guiding line for the use of emergency powers. By adopting the Weberian straight-line to assert the legitimacy/superiority of their models, Kelsen and Schmitt did not address how and to what extent each of their own models should accommodate the presence of its opposite, including supporters of each.

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<sup>196</sup> Jeffrey Seitzer, ‘Carl Schmitt’s Internal Critique of Liberal Constitutionalism: Verfassungslehre as a Response to the Weimar State Crisis’ (1997) 10 Can JL & Jur. 203, p 223.

<sup>197</sup> Dyzenhaus, ‘Hermann Heller’, p 645.

## **7. The Kelsen-Schmitt debate in Thailand?**

From the last section, the following conclusions can be further derived. Firstly, both the original Kelsen-Schmitt debate and contemporary commentaries are mainly centred on the role of Kelsen and Schmitt as jurists/theorists, thus largely failing to address the problem of the theoretical asymmetry I assessed earlier. Secondly, it is also obvious that Kelsen's constitutional emergency model is premised on the dominance of liberalism and Enlightenment rationality, while its Schmittian counterpart seeks to challenge them. As jurists/theorists, each however asserted the superiority of his own theories. Given the rise of authoritarianism in Weimar, especially in the 1930s, and the Nazi takeover, it appears that Kelsen, by adopting the Weberian instrumental rationality to defend his arguments, was unable to acknowledge the inferiority of his liberal model. In this thesis, I extend the analysis of the Kelsen-Schmitt debate beyond the scope of these limits and those of the Weimar experience illustrated by lessons from emergency powers in the PCLD in post-absolutist Thailand.

### ***7.1 From Weimar to Thailand***

Just as in Weimar, Thai democracy is deeply unstable. More importantly, Thailand's turbulent politics, resulting in the use of emergency powers, reflects the application of the Kelsenian and Schmittian competing conceptions of political authority and their relationship with society. In fact, given the hegemonic status quo of the right-wing conservatives, Thai politics, like Weimar, reflects the *de facto* dominance of Schmitt over Kelsen.

On the one hand, there are the attempts by some nobles, senior bureaucrats, and top military officials to preserve the *Thai-ness* tradition—the idea of the Buddhist nation embodied by the virtuous monarch *qua* the HoS—against the emergence of liberal forces, in particular, through coups and martial law, an approach which Schmitt was a staunch supporter. Although these emergency powers never led to civil war, from the perspective of the royalist-conservative elites, the rise of liberal forces to a level that challenges *Thai-ness* was still regarded as a political crisis, typically justified as such in its coup announcement.<sup>198</sup> Coup-makers have further sought to discredit liberal democracy by citing political romanticism and the corruption it entails.<sup>199</sup>

By contrast, the Thai experience also reflects recurring demands for Kelsenian liberal constitutionalism, seeking to subject political competition and state authority, including emergency powers, to democratic constitutional laws/constraints. Kelsen's theory was

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<sup>198</sup> Tom Ginsburg, 'Constitutional afterlife: The continuing impact of Thailand's postpolitical constitution' (2009) 7 I•CON 83, p 88.

<sup>199</sup> Federico Ferrara, *The Political Development of Modern Thailand* (CUP 2015), p 271.

explicitly adopted in the 1997 Constitution drafted after the mass uprising in 1992, notably his constitutional court model and his negative attitude towards extra-legality.

Yet, significant differences between the two contexts are also conspicuous, and can be addressed from two main angles—the dominance of Schmitt over Kelsen and the challenge against Schmitt by Kelsen. I will later apply these instances to construct the alternative normative perspective for reading Kelsen and Schmitt—the pragmatic hybrid—and conclude the binary-star conception of emergency powers.

Firstly, the drafting of the Weimar Constitution and the Kelsen-Schmitt debate took place in the modern European context in which liberalism and Enlightenment rationality constituted dominant lines of thought.<sup>200</sup> Committing to such predominance, the social democrats (the SPD) chose to resist the *Preussenschlag* decree by taking ‘the legal path’, that is, by asking *the Staatsgerichtshof* to grant an injunction rather than by resorting to violent means.<sup>201</sup> Secondly, Weimar reflected an eventual overthrow of liberal democracy. Succeeding in purging the SPD in Prussia, a bastion of liberal democratic values, the *Preussenschlag* facilitated the Nazi takeover. Weimar’s downfall was simultaneously galvanised by the stab-in-the-back myth mentioned in the Preface which prevented the rise of pro-democracy activists. Given such collapse, Dyzenhaus regards this as Schmitt’s professorial triumph over Kelsen.<sup>202</sup>

In contrast to Weimar and post-French Revolution Europe, we should primarily keep in mind that in Thailand, liberalism and Enlightenment rationality have never been predominant norms. Where the SPD committed to the liberal ethos to ensure Weimar’s survival, such a firm commitment is generally lacking, if not absent, in the Thai context. As I will show in Chapter 3, there were occasions that governments claiming to champion liberal democracy cited its protection to justify invoking authoritarian emergency statutory powers against political opponents. The Thai experience therefore reflects how the fulfilment of the PoA is compromised by the Schmittian logics, notably the radical legitimacy of law over that of legality. Nevertheless, notwithstanding the lack of a strong liberal culture, the Thai democratic experiment, though unstable for more than 85 years, is not a total failure. Although recurring royalist coups reveal the dominance of the Schmittian model, the permanent overthrow of liberal democracy and constitutionalism is hardly possible. As I will show later, the greater the division between the pro-democracy and the right-wing conservative factions is entrenched, the more these political actors are unable to resist the legitimacy of liberalism. Put

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<sup>200</sup> Seitzer, ‘Carl Schmitt’, pp 211-212.

<sup>201</sup> Arnold Brecht, *Prelude to silence: the end of the German republic* (OUP 1944), p 67.

<sup>202</sup> Dyzenhaus, *Legality*, p 5.

more theoretically, while Dyzenhaus observes that the collapse of Weimar connotes Schmitt's triumph over Kelsen, the Thai experience reveals the graver tension between 'waning but still dominant' traditional 'Schmittian' authority and 'more legitimate but still weaker' pro-liberal 'Kelsenian' forces with, as yet, no absolute winner. Here, the latter also addresses the deficiency associated with Kelsen's adoption of the Weberian instrumental rationality as it reflects how the rise of mass politics and political actors struggling in the real-world political arena help realise the 'inferior but sturdier' PoA.

Nevertheless, due to its turbulent politics, there may be 'scepticism' about the possibility of establishing a legal theory of emergency powers based on the Thai experience. Yet, the attempt has been made. Next, I examine literature attempting to theorise emergency powers in Thailand.

### ***7.2 Theorising emergency powers in Thailand?***

In his chapter *Emergency powers with a moustache*, Andrew Harding mainly considers the theorisation of emergency powers in Thailand to be 'highly problematical' given its authoritarian/anti-liberal realist culture especially in security and emergency contexts which marginalises the intrinsic rationality of law.<sup>203</sup> As his chapter was finalised in 2008, he does not assess the problem/perception of 'double standards' with respect to the Constitutional Court's subsequent intervention during the invocation of emergency powers by the Red government against the Yellow protesters which I will explain in Chapters 3 and 4. Such problem appears to further undermine the rationality of the law, especially its role in controlling emergency powers, as it is turned into a mere pawn in a political game.

Nevertheless, I argue that it is too crude to totally reject conceptualising the nature and use of emergency powers in the PCLD in Thailand. Explicitly, by thinking of law/constitutionalism beyond the context of its immanent *rationality* (state authority), my thesis is going to illustrate that the Thai exigencies reveal the tense relationship between it and the sphere of *unreason* (value-judgment), or more precisely, between law, politics, and society. This, arguably, reflects the struggles to enforce and undermine the mechanism for legally controlling emergency powers to achieve a factional political interest. And, it is from this perspective that I must turn to Victor Ramraj's work as it reflects the most prominent attempt to theorise emergency powers in fledgling democracies through the lens of the Thai experience, recognising this as *the emergency powers paradox* ('EPP').

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<sup>203</sup> Andrew Harding, 'Emergency powers with a moustache: special powers, military rule and evolving constitutionalism in Thailand' in Ramraj and Thiruvengadam (eds), *Emergency powers in Asia*, p 313.

Ramraj criticises some of contemporary works on emergency powers for limiting their studies to entrenched liberal regimes. In contrast to Harding, Ramraj recognises the possibility of theorising emergency powers through the lens of the limits of law/legality. He uses the Thai case as one example alongside those of Malaysia, Singapore, and Timor-Leste to theorise emergency powers in fledgling democracies. According to the EPP, where emergency powers are invoked in established rule-of-law states to ‘preserve constitutionalism’, they are more prone to function to ‘establish basic conditions of relative stability’ out of a political crisis in fledgling democracies such as Thailand than elsewhere where the main challenge remains how ‘effective mechanisms’ for ensuring the accountability of such powers are to be created.<sup>204</sup> As a liberal, Ramraj urges that only through the establishment of a liberal-democratic constitutional order, can abuses of emergency powers be prevented.<sup>205</sup> To enhance such establishment in a society like Thailand, political struggles are un-avoidable.<sup>206</sup> These two tasks of emergency powers are acknowledged by both Kelsen and Schmitt. Favouring the legislative accommodation model, Kelsen argued that the task of maintaining social order must respect the preservation of legality, while, for an anti-liberal realist like Schmitt, the former trumps the latter.

This PhD thesis is partially inspired by Ramraj’s above suggestion that it is possible to theorise emergency powers in Thailand from the perspective of the limit of law. The application of the Kelsen-Schmitt debate to the Thai context however exposes the flaw of the EPP, and provides an alternative theoretical understanding for studies on emergency powers. As a liberal, Ramraj values liberal constitutionalism over ‘Schmittian’ realism and ostensibly limits his study largely to the challenge of implementing liberal constitutionalism in emergencies in nascent democracies.<sup>207</sup> Accordingly, the EPP does not comprehensively assess the effects of ‘the gravitational relation’ between the liberalisation process and the dominance of the ‘Schmittian’ model on the use of emergency powers in the PCLD in Thailand. Besides, although Ramraj mentions the colour-coded crises in his work, his EPP is largely concerned with the cognition ‘*is*’ perspective, that is, with the imposition of state authority. It therefore fails to account for the conflicting views (value-judgment ‘*ought*’) on what counts as ‘the norm’

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<sup>204</sup> Victor V. Ramraj, ‘Constitutionalism and Emergency Powers’ in Clauspeter Hill and Jörg Menzel (eds), *Constitutionalism in Southeast Asia* (Konrad Adenauer Stiftung 2009), p 66; Ramraj, ‘EPP’, p 36.

<sup>205</sup> Victor V. Ramraj, ‘Emergency Powers and Constitutional Theory’ (2011) 41 HKLJ 165, pp 194-196.

<sup>206</sup> Ibid. I also assess his argument in Chapters 3 and 4.

<sup>207</sup> Victor V. Ramraj, ‘Constitutional Tipping Points: Sustainable Constitutionalism in Theory and Practice’ (2010) 1 TLT 191, p 194.

and ‘the exception’ exposed by the PCLD. The synthesis of the Kelsen-Schmitt debate in the light of the Thai experience in this PhD thesis addresses all these deficiencies.

There are, however, other works concerning emergency powers in Thailand notably some LL.M. theses written in Thai, which I will assess in detail in Chapter 3. Nevertheless, these works do not consider the legal philosophies behind emergency powers, and how struggles for political power between the royalist-conservatives and the pro-democracy movements affect the nature and characteristics of Thailand’s emergency powers—a key issue which helps identify how the Kelsenian and Schmittian emergency models might be modified. My study attempts to fill these gaps. Chapters 2 and 3 will explore a historical perspective on the use of emergency powers in Thailand.

### ***7.3 Beyond the Weberian instrumental rationality and dominant liberal democracy: theoretical framework for synthesising Kelsen and Schmitt***

Overall, I argue that the Thai experience challenges the theoretical asymmetry inherent in the Kelsen-Schmitt original debate as it reflects how both models compete with each other with no absolute winner, and are accordingly forced to adapt themselves to accommodate each other. In contrast to the assumptions underlying Kelsen’s and Schmitt’s theses, there has been an absence of consensus on whether the Kelsenian approach or its Schmittian counterpart should constitute the hegemonic model for dealing with the AoH associated with this situation, in particular, after the occurrence of the colour-coded crises in 2006. There is also a greater tendency that emergency powers are imposed by those stigmatised as ‘public enemies’ against others declaring themselves to be members of ‘friends’ of the state.

As already indicated, the aim of this PhD thesis is to apply the Kelsen-Schmitt debate to the Thai context which, in turn, provides an opportunity for reassessing assumptions and elements in the original Kelsen-Schmitt debate. The Thai experience invites us to revisit and synthesise Kelsen’s and Schmitt’s theories of law and politics, and other key elements related to their application in the context of emergency powers in the PCLD, namely their competing conceptions of emergency authority, their debate on the scope of emergency powers in political crises, and their contrasting conceptions of legal and political accountability of the invocation and use of emergency powers together with the AoH. This also poses the question of how, and of so to what extent, the Thai experience suggests an alternative normative perspective for reading Kelsen and Schmitt based on the Weberian straight-line and, more specifically, a normative framework for comprehending them alternative to *individualism/collectivism, scepticism, and hostility*.

My final task in this chapter is to conclude the theoretical framework for synthesising Kelsen and Schmitt to answer my research questions based on what I characterise as the *internal* and *external* perspective of the constitutional emergency model. These perspectives are constructed on the logic of the tension inherent in emergency powers in the PCLD—the tension between claim-right and justification-right.

On the one hand, the *internal* perspective connotes the imposition of each model or ‘its claim-right’, that is, the (re-)assertion of its legitimacy and authority. Based on this logic, given that Kelsen and Schmitt each were originally more preoccupied with justifying their own arguments, neither of them assessed the extent to which each model should be *adapted* to defend and reassert its political legitimacy/hegemony against the challenge posed by its opposing political model and movements. This *internal* perspective focuses on this deficiency, in particular, how the efforts to reassert each constitutional emergency model affect Kelsen’s and Schmitt’s divergent conceptions of institutions, including their competing views of the legitimacy of legality and the radical legitimacy of law, and what their parallel effects are.

By contrast, the *external* perspective of the constitutional emergency model signifies ‘justification-right’ and therefore the issue of the AoH. It asks us to reconsider the application and justification of the two constitutional emergency models in the context of the AoH bred by the direct ideological and physical collision between liberal and right-wing conservative movements and between the attempts to reassert the political legitimacy of the Kelsenian approach and of its Schmittian counterpart against each other with no absolute winner. Again, the adoption of the purposive-rational/instrumental type of action prevents Kelsen and Schmitt from addressing these issues. Both scholars also did not anticipate the problem of ‘double standards’ as in Thailand, whereby the success and failure of particular emergency powers depend on ‘who’ invoke them. This *external* perspective suggests that we revisit the two scholars’ positions on (a) the norm-exception dichotomy, in particular, its relation with the AoH associated with the PCLD; (b) the authority, the accountability, and the SoE, notably its key characteristics; and (c) the ‘*is-ought*’ structure of their models, including the role of liberalism which involves the relation between the legitimacy of legality and the legitimacy of law.





## **Chapter 2: Emergency Powers in Thailand in Historical Perspective**

### **1. Introduction**

In this chapter, I mainly aim to describe the uses of emergency powers in the PCLD in post-1932 Thailand and identify some of their key general features. For more than 80 years, intermittent periods of political instability, which precipitated the use of emergency power, in post-absolutist Thailand have always been the same story only with different actors (see Appendix 2). This *constitutional saṃsāra* results in the cycle of coups and emergency powers to overthrow parliamentary democracy considered by royalist-conservatives as the source of the PCLD.<sup>208</sup> An interim constitution is drafted, followed by a new permanent constitution restoring electoral politics. Civilian authority then challenges the *Thai-ness* establishment, which, in turn, precipitates another coup and emergency powers. In particular, in 2008, 2013, and 2014, emergency powers were invoked by the purported pro-democracy ‘Red’ faction against the right-wing ‘Yellow’ faction. However, although I primarily focus on post-absolutist Thailand, it is important to examine the traditional view of emergency powers through the lens of the country’s political history before 1932 in order to understand the resemblance between it and Schmitt’s idea of an existential constitution and the reasons for this Schmittian approach over its Kelsenian alternative.

The study of emergency powers in the PCLD in Thailand, I argue, has strictly to be based on the ‘cognition-ideal entities’ dichotomy, that is, the tension between ‘authority’ and ‘value-judgment’ discussed in Chapter 1. From the *ideal entities* (‘ought’) perspective, the Thai experience reveals the competing notions of political legitimacy between the traditional form of authority—*Thai-ness*—and contending struggles for liberal constitutionalism and democracy, resulting in the PCLD and therefore uses of emergency powers by both the ‘Yellow’ and ‘Red’ factions to preserve what each understands as ‘the norm’. This, in turn, leads to the second tension, from the *cognitive* (‘is’) perspective, that is, between the relentless attempts to maintain sovereign authority under the mantra of *Thai-ness* and the struggles to ensure compliance of emergency powers with liberal constitutionalism.

This chapter has three main parts. The first part explains emergency powers in the traditional Thai constitutional/political theory, in the pre-1932 period. Here I aim to elaborate the general contours of the traditional Thai constitutional/political theory, and to explain why it constitutes the hegemonic conception of political authority in Thailand. The next two

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<sup>208</sup> In Buddhism, *Saṃsāra* means the cycle of relentless rebirth. A prominent Thai political scientist, Chaianan, calls this ‘the vicious cycle’. See Chaianan Samutwanit, *Thai Young Turks* (ISEAS 1982), pp 1-5.

consider the application of emergency powers in Thailand's PCLD pre-1997 and post-1997, i.e., during the colour-coded crises between 2006 and 2017. I argue that the Thai experience reflects a growing shift from *contestation* to *collision* between the Red and the Yellow ideas. On the one hand, the pre-1997 period revealed that the traditional elites were successful at least in applying modern technologies, in particular, the modern state, the notions of (formalistic) constitutionalism and (identitarian) democracy to institutionalise *Thai-ness*, but had at the same time more greatly to accommodate the presence of rising liberal demands. By contrast, I argue that due to greater modernisation and liberalisation, 21<sup>st</sup> century Thailand is experiencing a direct ideological and physical collision between the two conceptions of emergency authority and political stability together with the role hugely important of the masses in influencing the direction of emergency powers. This collision results on the lack of consensus on the hegemonic conception of emergency powers and political stability.

## Part 1: Emergency powers in traditional Thai constitutional/political theory

Like Schmitt, the Thai royalist-conservative elites have long adopted a negative attitude towards liberalism and parliamentary democracy, criticising commitment to state neutrality for inducing political romanticism, thus producing the ever-present risk of political crisis. These ideas later provided the basis for the ‘Yellow Shirts’ movements in 21<sup>st</sup> century Thailand. Here, I ask: *What are the ‘key features’ of emergency powers in Thai constitutional/political history?* To answer this question, I should begin by recalling that Schmitt primarily based his concept of sovereign authority not on mysticism, but on Weber’s *plebiscitary leader*—a *charismatic* leader whose authority rests on popular acclamation. Nevertheless, Schmitt’s support for a tangible, concrete authority further reminds us of another neglected Weberian type of personalistic authority—*traditional*—which might be rationalised and modernised and incorporated into Schmitt’s thesis.

Weber distinguished two types of ‘traditional authority’: (a) that under which the relationship between ruler and ruled is based on personal authority; and (b) that under which this relationship is also related to control over land, namely feudalism.<sup>209</sup> My primary focus here is on the first type—patrimonialism. Under patrimonialism, the traditional master (in his public capacity), typically the king, stands at the pinnacle of a social pyramid, with his position of authority secured not primarily through a legal code, but through ‘piety for what actually, allegedly, or presumably has always existed’.<sup>210</sup> Unlike Schmitt, who developed his theory from his Catholic beliefs and advocated the sovereign authority of a strong plebiscitary President, the traditional view of emergency powers in political crises in Thailand is based on the patrimonial concept of the Buddhist righteous king or the *Dhammaraja*.<sup>211</sup> Despite such differences, each nevertheless emphasises a concrete, flesh and blood leader/HoS, who embodies the homogeneous communitarian will, a resemblance increasingly apparent especially after the rightist conservative constitutional approach developed in Thailand in the 1930s, witnessed particularly after 1947 and, especially from 1958 onwards.

I begin this chapter by exploring the key features of the *Dhammaraja* tradition, followed by its adaptation to accommodate the process of modernisation between the late 1850s

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<sup>209</sup> Weber, *Economy*, pp 226-237.

<sup>210</sup> Weber, ‘The Social Psychology’, p 296.

<sup>211</sup> However, in modern Thailand, the legal-rational and charismatic types of legitimacy also bolster the monarchy. Andrew Harding, ‘Buddhism, Human Rights and Constitutional Reform in Thailand’ (2007) 1 AsJCL 1, p 2.

and 1932, before lastly concluding with the key features of emergency powers in more recent Thai constitutional/political history.

## **2. The *Dhammaraja* tradition: the basis of political stability and authority in Thailand**

The tradition of ‘benevolent ruler’ which constitutes the traditional concept of political authority is largely shaped by the Mon-Khmer civilisation. The Thais borrowed from the Cambodians (*Khmers*) the idea of *Devaraja* (the God-like king), an incarnation of Hindu deities who stands at the centre of the cosmological order, and is paid tribute by ‘lesser divinities’.<sup>212</sup> This tradition has also been endorsed by Theravada Buddhist teaching received from the Mons, making it more compatible with Thai culture.<sup>213</sup> As a result, the Thai monarch even today is generally considered to be the *Dhammaraja*, ‘the father of the family-nation’, expected to reign in accordance with *Dhamma* (Buddhist teachings).<sup>214</sup> What follows from this is that the *Dhammaraja* is subsequently viewed as a good person (*Khon Dee*).<sup>215</sup> The *Dhammaraja* tradition is further based on the fundamental Buddhist teaching of *Karma*, under which past and present intentional actions are presumed to cause future consequences. Notwithstanding our inability to know his personal moral quality, due to his position, the Thai monarch is *presumed* to have accumulated the highest degree of good *Karma* within the kingdom, while those associated with or working in the name of the king are also supposed to accumulate good *Karma*.<sup>216</sup>

Overall, the traditional concept of political authority reflects the key characteristic of Weber’s patrimonialism, in that, it is a product of a traditional belief in a stratified authority rather than in individualism and humanism.<sup>217</sup>

## **3. From the *Dhammaraja* tradition to *Thai-ness***

During the reign of King Chulalongkorn (1868-1910), Bangkok faced a serious colonial threat as the British and French endeavoured to bring Siam (Thailand’s name before 1939) under their control, forcing him rapidly to modernise the country. Together with the king’s successful foreign policy, the modernisation project was key to preventing Thailand from being formally colonised by European powers. However, the intervention of such powers, though

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<sup>212</sup> Frank Darling and Ann Darling, *Thailand: The Modern Kingdom* (Donald Moore 1971), p 82.

<sup>213</sup> The Mons are ethnic minorities in Myanmar. David M. Engel, *Law and Kingship in Thailand during the Reign of King Chulalongkorn* (U-M 1975), pp 2-4.

<sup>214</sup> Ibid; Dhani Nivat (Prince), ‘The Old Siamese Conception of the Monarchy’ (1947) 36 *Journal of the Siam Society* 91, pp 94-96.

<sup>215</sup> Thak Chaloemtiarana, *Thailand: The Politics of Despotic Paternalism* (SEAP 2007), p 3.

<sup>216</sup> Ibid, p 83; Jack Fong, ‘Sacred Nationalism: The Thai Monarchy and Primordial Nation Construction’ (2009) 39 *JCA* 673, p 688.

<sup>217</sup> Anthony T. Kronman, *Max Weber* (SUP 1983), p 44.

providing Siam with new technologies, increasingly fostered a mild version of xenophobia among its ruling elites, which still exists and affects resort to emergency powers in the PCLD.

Before the late 19<sup>th</sup> century, Bangkok was just a city that dominated other weaker semi-autonomous city-states. The king realised that even though he, in theory, stood at the zenith of the medieval administrative system known as *Sakdina*, the semi-feudal system of *Phrai* (human labour), in reality, this weakened royal authority as it bestowed an ability to control manpower on the nobility (*Nai*), and, in turn, hindered the king from modernising his country.<sup>218</sup> King Chulalongkorn accordingly based his modernisation project, known among Western scholars as ‘*the Chakri Reformation*’, on the ‘nation-state policy’.<sup>219</sup> In the process, new European-style ministries were created to replace *Sakdina*, and to initiate modernisation from the centre across the Thai polity. A salaried bureaucracy replaced the personal links between *Phrai* and *Nai*, leading to the need for an increasing number of bureaucrats, while a Western-style judicial system and the idea of ‘positive law’ were espoused to consolidate King Chulalongkorn’s law-making power, and became vital tools for implementing modernisation, including the establishment of a standing army, in ways that were legal, legitimate, and in accordance with Western standards.<sup>220</sup>

Furthermore, realising the need to create a standing army to defend the nation-state from internal and external threats, King Chulalongkorn promoted the Military Service Act 1905 formally to replace *Phrai* with a Western military conscription system. Besides, the Slave Abolition Act completely abolished slaves in Siam in 1905. The Military Academy had previously been founded in 1897 but was restricted merely to noblemen. The new standing army was not only essential for securing the nation from external threats, but also and more importantly enabled the king to exert his authority over his subjects throughout the nation-state.<sup>221</sup> The creation of the standing army also significantly bolstered the ‘social status’ of the military, enabling it to play an influential and dominant role in Thai politics from the very beginning of Thailand’s modern history.<sup>222</sup>

Notwithstanding his progressive policies, King Chulalongkorn was also a conservative, especially in political matters, who saw excessive adoption of Western culture as a threat to

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<sup>218</sup> Under *Sakdina*, the king granted *Phrai Som* (an ordinary person) to nobles who also performed a role in supervising *Phrai Luang* (labour working for the king and the administrative units). Chris Baker and Pasuk Phongpaichit, *A History of Thailand* (3<sup>rd</sup> edn, CUP 2014), pp 41-42.

<sup>219</sup> Pasuk Phongpaichit and Chris Baker, *Thailand: Economy and Politics* (OUP 1995), p 211.

<sup>220</sup> Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart 2011), pp 191-193.

<sup>221</sup> Paul Chambers, ‘Military “Shadows” in Thailand since the 2006 Coup’ (2013) 40 *Asian Affairs: An American Review* 67, p 69.

<sup>222</sup> Kullada Kesboonchoo Mead, *The Rise and Decline of Thai Absolutism* (Routledge 2004), pp 80-81.

‘Thai identity’, including his absolute authority.<sup>223</sup> Thus, to maintain monarchical absoluteness in the era of nation-state formation, he sought to transform the *Dhammaraja* into the embodiment of the modern Thai nation.<sup>224</sup> His son, King Vajiravudh (1910-1925), subsequently made the three pillars of *Nation-Religion-Monarchy* (‘the *sacred trinity*’) into official state ideology, which constitutes *Thai-ness*, political stability and unity, and to identify who holds sovereign authority.<sup>225</sup> The *sacred trinity* functioned as a vital tool for ‘[directing] the people’s loyalty to [the throne] rather than the cultural geopolitical state’, and did not traditionally concern an expression of loyalty to legality.<sup>226</sup> Also, *Thai-ness* has been an instrument for binding the military and bureaucrats (except the civilian and military cliques of *the People’s Party*) to the monarchy even nowadays.

Above all, modernisation in Thailand did not stem from a decline in traditional culture as in the West but was instead produced by traditional aristocrats. By focusing on growing bureaucratisation, Weber and Kelsen did not consider that an attempt might be made to refashion and rationalise traditionalism, as in Thailand, where *Thai-ness* was set as ‘[the] underlying conceptual commitments of the legal order.’<sup>227</sup> As *the sacred trinity* became firmly entrenched as a part of the modernisation process in a relatively short time, it became difficult for modern state officials and ordinary people to totally discard it despite the eventual downfall of absolutism in 1932. As I will show, *Thai-ness* nevertheless remains vital for preserving the monarchy under the guise of parliamentary democracy. Having examined the key characteristics of this tradition, our next task is to link it with political stability and emergency powers.

#### **4. Emergency powers and political stability in Thai history: liberal democracy as a threat**

Having explained the key features of the *Dhammaraja* tradition and *Thai-ness*, I next consider the relationship between them and emergency powers. Before the *Chakri Reformation* took place, the medieval law called the *Thammasat* bestowed upon the king the authority to

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<sup>223</sup> Pavin Chachavalpongpun, ‘The Necessity of Enemies in Thailand’s Troubled Politics’ (2011) 51 *Asian Survey* 1019, p 1023.

<sup>224</sup> Kevin Hewison and Kengkij Kitirianglarp, ‘Thai-Style Democracy’ in Søren Ivarsson and Lotte Isager (eds), *Saying the Unsayable: Monarchy and Democracy in Thailand* (Nordic Inst of Asian Studies 2010), p 187-188.

<sup>225</sup> Eiji Murashima, ‘The Origin of Modern Official State Ideology in Thailand’ (1988) 19 *JSEAS* 80, p 92; Frank E. Reynolds, ‘Dhamma in Dispute: The Interactions of Religion and Law in Thailand’ (1994) 28 *Law & Society Review* 433, pp 437-440.

<sup>226</sup> Björn Dressel, ‘When Notions of Legitimacy Conflict: The Case of Thailand’ (2010) 38 *Politics & Policy* 445, p 454.

<sup>227</sup> Robert W. Compton, *East Asian Democratization: Impact of Globalization, Culture, and Economy* (Praeger 2000), pp 35-36; Susan H. Williams, ‘Constitutions and Difference: Ideology and Institutions’ in Susan H. Williams (ed), *Social Difference and Constitutionalism in Pan-Asia* (CUP 2014), p 13.

enact a royal decree (*Rajasat*) called ‘the Law of Treason’ (‘the *Phra Aiyakan Krabotsuek*’).<sup>228</sup> This law may be regarded as the source of medieval emergency powers given its aim of prohibiting any threat to the throne through special means, notably the use of deadly forces.<sup>229</sup> However, its application was subject to one *de facto* exemption. If the king was incapable of unifying his kingdom, he would no longer be able confidently to claim the *Dhammaraja* status. Precipitating political instability and an emergency situation, such circumstances would permit a coup, as a *de facto* exception of the *Phra Aiyakan Krabotseuk*, to be staged by a more powerful contender declaring himself to be the new *Dhammaraja*.<sup>230</sup> Overall, standing at the centre of Thailand’s traditional political establishment, political stability under the Thai tradition is therefore dependent on the security of the monarchy, whilst the Buddhist righteous king was a legitimate source of emergency powers.<sup>231</sup> Above all, the Theravada Buddhist concept of *Karma* however planted the seeds of the SoE within the Thai constitutional tradition, thus making the rules governing entitlement to rule flexible.<sup>232</sup> In a broader picture, this flexibility was premised on the fundamental Buddhist idea underscoring that change and impermanence (*Anatta*) are undeniable universal truths.<sup>233</sup>

The traditional view of emergency powers in political crises struggled with the new threat of European imperialism and Siam’s engagement with globalisation in the late 19<sup>th</sup> century. As mentioned, despite considering Western technologies essential for modernising the country, the traditional elites were deeply suspicious of the fully-fledged transplantation of ‘Western culture’, in particular, liberalism and parliamentary democracy, which would replace traditional Thai social stratification with pluralism, rule-bound legalism, and formal equality. This suspicion was allied with the fact that the *Chakri* Reformation was initiated by the nobles. In short, it can be said that Thailand could successfully avoid being formally colonised by labelling, from the outset of its modernisation process, liberalism as ‘the exception’ threatening

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<sup>228</sup> Andrew Huxley, ‘Buddhist Law as a religious system?’ in Andrew Huxley (ed), *Religion, Law and Tradition: Comparative Studies in Religious Law* (Routledge 2002), p 142; Michael Vickery, ‘Prolegomena to Methods for Using the Ayutthayan Laws as Historical Source Material’ (1984) 72 *Siam Society* 37, pp 49-50.

<sup>229</sup> Sections 2 and 5 of the Law of Treason; David Streckfuss, *Truth on Trial in Thailand* (Routledge 2011), pp 60-61; สุจิตต์ วงษ์เทศ [Sujit Wongthes], *กรุงแตก ยศล้มแล้ว [The Fall of Ayutthaya]* (Praphansarn 2012), pp 115-165.

<sup>230</sup> For instance, in 1629, the military commander, Chao Phraya Kalahom Suriyawong later known as King Prasat-Thong (1629–1656), imposed a coup and invoked this justification against the incumbent young king. กรมศิลปากร [The Fine Arts Department], *พระราชพงศาวดารฉบับพระราชหัตถเลขา เล่ม 2 [The Royal Annals volume II]* (7<sup>th</sup> edn, Khlang-Wittaya 1973), pp 8-24.

<sup>231</sup> Duncan McCargo, ‘Network monarchy and legitimacy crises in Thailand’ (2005) 18 *The Pacific Review* 499, p 501.

<sup>232</sup> Cf Michael Jerryson, ‘The Buddhist State of Exception’ in Hiroko Kawanami (ed), *Buddhism and the Political Process* (Palgrave Macmillan 2016), pp 147-148.

<sup>233</sup> Ginsburg, ‘Constitutional afterlife’, p 88.



the state's fundamental value, namely the three pillars of *Nation-Religion-Monarchy*. This then makes Thai and Weimar situations worth comparable. In Weimar, the right-wing conservatives, including Schmitt, sought to react against the prevalence of liberalism and Enlightenment rationality.<sup>234</sup> However, due to the success of the *Chakri* Reformation, such predominance has never genuinely existed in Thailand. Rather, the Thai case is an example of 'modernisation without full disenchantment', and the conservative argument against the paradox of modernity and liberalisation, i.e., the notion that modernisation and liberalisation lead to the polytheism of values, as Schmitt believed, prevailed in Thailand from the very beginning of its modern history. Therefore, the challenge to the Kelsen-Schmitt debate drawn from the modern Thai history is how to the two forces—'dominant but increasingly challenged' authoritarianism and 'emergent but still weaker' liberalism—struggle against each other. Pre-1932 Thai history, I again note, helps readers gain insight into this complex struggle in contemporary Thailand and its problem of *constitutional saṃsāra*.

In 1885, led by Prince Prisdang, a group of seven noblemen, working at the Royal Thai Embassies in London and Paris, decided that the model of 'nation-state' was essential for preserving national integration but preferred a transition to constitutional monarchy. For the first time in Thai political history, the notions of popular sovereignty, a parliamentary system consisting of elected representatives, a bureaucratic legal-rational regime together with equality before the law, and cabinet government, were proposed before the royal court.<sup>235</sup> The prince accepted that, insofar as political power at the time was concentrated in the hands of the monarch, no civilised person could and should believe that justice could be maintained in the kingdom. King Chulalongkorn nevertheless resorted to the *Dhammaraja* tradition to reject the petition, asserting that since, unlike absolute monarchs in Europe, he was not repressive nor unduly short-sighted—his status did not therefore hinder Siam's security and prosperity, whilst any limitation of his royal authority would halt the process of reform Siam needed.<sup>236</sup> In short, King Chulalongkorn was concerned that the abolition of the absolute monarchy would create chaos, emergencies, and a political crisis. The absolute regime was again threatened shortly after his death in 1910.

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<sup>234</sup> Herf, *Reactionary Modernism*, p 1.

<sup>235</sup> Murashima, 'The Origin', p 84.

<sup>236</sup> พระบาทสมเด็จพระจุลจอมเกล้าเจ้าอยู่หัว [King Chulalongkorn], พระราชดำรัสในพระบาทสมเด็จพระจุลจอมเกล้าเจ้าอยู่หัว ทรงแถลงพระบรมราชาธิบายแก่ไขการปกครองแผ่นดิน [*King Chulalongkorn's Explanation of Government Reforms*] (Sophonpipatanakorn 1927), pp 62-63.

Later, in 1912, during King Vajiravudh's reign, a coup was planned by a group of soldiers against 'the abuses of absolutist power'.<sup>237</sup> Some demanded constitutional monarchy and a written constitution.<sup>238</sup> However, the plan was leaked, and the plotters were rounded up. For the conservative royalists, the 1912 incident constituted a threat to the monarchy inspired by increasing demands for liberal democracy, and therefore constituted an emergency.<sup>239</sup> In response to emergencies entailed by potential liberal movements, the government passed the Martial Law Act 1914 which grants the king absolute power to sanction martial law declarations throughout, or in some parts, of the kingdom in response to threats to the nation's stability.<sup>240</sup> Within any martial law area, military officials have superior power over their civil counterparts with respect to national security.<sup>241</sup> The 1885 and 1912 incidents significantly inspired the plotters of the 1932 Revolution.

In sum, from the commencement of the modernisation process, among Thai conservatives, liberal democracy was deemed to be an exception to the rule needing to be repressed by emergency powers. They criticised it for accumulating bad *Karma* as its implementation would compromise royal authority and facilitate endless negotiations between leaders of factional interest groups (including the holding of ideologies inimical to political unity) whose minds are riddled with greed, selfishness and egotism.<sup>242</sup> Meanwhile, the Martial Law Act also enabled the military to intervene in times of crises without being subject to legal constraints, in particular, to protect the throne. It remains in force today, and has become, particularly since 1957, a vital tool for coup-makers dealing with perceived threats to *Thainess*, notably those presented by electoral politics. I will consider its details in full in Chapter 3.

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<sup>237</sup> Baker and Pasuk, *A History*, pp 110-111.

<sup>238</sup> Kullada, *The Rise*, ch 6.

<sup>239</sup> See พระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัว [King Vajiravudh], 'ลัทธิเอาอย่าง [The Cult of Imitation]' in พระราชนิพนธ์ที่นำเรื่องของล้นเกล้าฯ รัชกาลที่ 6 [The consolidation of interesting works by King Vajiravudh] (Rwmsarn 1963).

<sup>240</sup> Section 2; Toru Yano, 'Some Characteristics of Political Leadership in Thailand: Sarit Thanarat's "Revolutionary Party Edicts"' (1968) 6 *The Developing Economies* 233, p 240.

<sup>241</sup> Section 6

<sup>242</sup> Streckfuss, *Truth*, p 215; Thongchai Winichakul, 'Siam's Colonial Conditions and the Birth of Thai History' in Volker Grabowsky (ed), *Southeast Asian historiography: unravelling the myths* (River Books 2011), p 27.

## Part 2: Emergency powers in Thailand between 1932 and pre-1997

When King Prajadhipok (1925-1935) succeeded his elder brother, King Vajiravudh, in 1925, political power in Thailand was still monopolised by the royal clan and some members of top aristocratic families, causing dissatisfaction among the expanding middle-class and culminating in the Revolution on 24 June 1932 mentioned briefly in Chapter 1. The Revolution was relatively peaceful notwithstanding minor violence. *The People's Party* captured approximately 40 members of the royal family together with their aides. To avoid bloodshed, military personnel and armoured vehicles were then deployed to block roads in the centre of Bangkok, where the royal family was detained. King Prajadhipok agreed to a transition to a constitutional monarchy.

Nevertheless, as Ferrara observes, unlike revolutions in Europe and the U.S., the 1932 incident 'took place well before the emergence of any working-class movement, or [for] that matter, any form of mass mobilization.'<sup>243</sup> The weakness of non-bureaucratic social forces together with a deeply embedded royalist culture simultaneously militated against sufficiently strong popular resistance to the royalist-conservatives' counter-revolutionary potential and other forms of authoritarianism. Shaken by the abortive counter-revolution in 1933, *the People's Party*, in particular, its military faction led by Field Marshal Plaek Phibunsongkhram ('Phibun') strove to deal with political conflict through harsh emergency powers instead of bolstering mass mobilisation, thus retarding both developed liberal democracy and the formation of an active citizenry.<sup>244</sup> At the same time, for the royalist-conservatives, 'the loss of royal prestige' constituted an exception and a political crisis, thus leading to attempts to restore *Thai-ness* hegemony. With assistance from the military, emergency powers—coups together with impositions of martial law—have been vital tools for the royalist-conservatives in securing their hegemony over electoral politics, and in establishing their version of political stability, especially since the late 1950s.

In this part, I primarily explore the project Pridi Banomyong, the civilian leader of the People's Party, sought to entrench in post-1932 Thailand which provided a milestone for the way for the explicit adoption of Kelsen's theory in 1997. I then consider the 'Thai-ification' of Schmitt's constitutional logic and approach by examining the key feature of the emergency

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<sup>243</sup> Actually, the *People's Party* itself was composed of merely 52 mid-ranking military officers and 50 civil servants. Federico Ferrara, 'Unfinished Business: The Contagion of Conflict over a Century of Thai Political Development' in Pavin Chachavalpongpun (ed), *"Good Coup" Gone Bad: Thailand's Political Developments since Thaksin's Downfall* (ISEAS 2014), p 24.

<sup>244</sup> Ibid.

regime called the Thai-style democracy before exploring its struggles with rising liberal forces since the late 1960s.

### **5. Pridi Banomyong and liberal constitutionalism: the milestone for ‘Kelsen’**

Criticising the absolute regime for placing a monarch above and unbound by law, which, in turn, bestowed power on him to suppress his political opponents, and for its incompatibility with the Enlightenment ideas of humanism and rationalism, Pridi sought to establish institutional stability through law. He decided to move Thailand forward to greater endorsement of the legal-rational state by adopting the ideas of constitutionalism and meritorious bureaucracy, and sovereign power transferred from the king to the people. Despite his education in France and not explicitly stating whether or not Kelsen was an influence, his legal and political ideas, nevertheless, largely parallel the Kelsenian outlook, probably due to the shared liberal leftist background and to the influence of Rousseau’s views on freedom each embraced. The fact that Pridi’s project became a milestone in the constitutional reform of Thailand in 1997, significantly influenced by Kelsen’s thesis of democratic constitutionalism, further makes their ideas worth comparing.<sup>245</sup>

Initially, Pridi took part in drafting the first three Thai constitutions—the 1932 Interim Constitution promulgated on 27 June 1932, the 1932 Constitution promulgated on 10 December 1932, and the 1946 Constitution. Nevertheless, his political life was not a bed of roses. To ensure the survival of the new regime after the 1932 Revolution, Pridi had to rely on the military faction of *the Party’s Party* led by Phibun, who exploited the rhetoric of liberal constitutionalism as a justification for defeating the old nobles, only to undermine the spirit of liberalism itself. His conflict with the royalist-conservatives, and later with Phibun, forced Pridi to escape into exile twice in 1933 and 1946, in France and China respectively. After failing to overthrow Phibun’s dictatorship in 1948, Pridi was compelled to live in permanent exile until his death in 1983. After being ousted by Phibun in 1947, Pridi criticised the military practice of declaring emergencies and martial law for disregarding the rights and freedom of the people guaranteed by a written constitution.<sup>246</sup> Despite its outward brevity, this comment, if read in combination with provisions enshrined in the aforesaid three constitutions, his books and

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<sup>245</sup> Björn Dressel, ‘Thailand: judicialization of politics or politicization of the judiciary?’ in Björn Dressel (ed), *The Judicialization of Politics in Asia* (Routledge 2012), pp 82-83; สมคิด เลิศไพฑูรย์ [Somkit Lertpaithoon], ‘รัฐธรรมนูญในอุดมคติของปรีดี พนมยงค์’ [‘Pridi Banomyong’s ideal conception of the constitution’] (2000) 22 Rattasat-Sarn 1, pp 19-20.

<sup>246</sup> Pridi Banomyong, *Pridi By Pridi: Selected Writings on Life, Politics, and Economy* (Chris Baker and Pasuk Phongpaichit (trs), Silkworm 2000), p 167.

articles written both before and after 1948 and other secondary literature, provide a fuller picture of his ‘ideal’ project of constitutionalism.

Having advocated the core of liberal constitutionalism, that the constitution is the supreme law, Pridi, like Kelsen, intended to make it ‘a new focus of public loyalty’ by vigorously urging every Thai, through radio broadcasting, ‘to love the nation and [to] preserve the constitution’ since it ‘fuses [everyone] as one unity.’<sup>247</sup> As with Kelsen, given that he wanted every faction to participate in a political life of the state on a formally equal footing, Pridi also advocated a permanent constitution to foster peace and compromise between different interests, in particular, between Thai progressives and royalist-conservatives.<sup>248</sup> His brief view on emergency powers further mirrors his distaste for authoritarianism, notably resulting from their exercise without prior legal authorisation and without paying due respect to individuals’ rights and liberties.<sup>249</sup> Like Kelsen, Pridi believed that any ‘unconstitutional’ emergency decrees which disrespected individuals’ rights and freedoms cannot be regarded as legitimate state action.<sup>250</sup>

Despite the relatively peaceful takeover in 1932, the traditional elites strove to restore the monarchy’s political power.<sup>251</sup> In October 1933, King Prajadhipok’s cousin and a military commander, Prince Boworadej organised a counter-revolutionary force aimed at restoring absolutism. Fierce battles were fought between the prince’s troops and the state military led by Phibun, before the rebellion was eventually overcome, indicating that without the military faction, *the People’s Party* would not have remained in power.<sup>252</sup> In turn, the domination of the military clique put Pridi’s constitutional project and his intention to compromise with the royalist-conservatives in jeopardy as many of the former faction did not share his commitment to constitutionalism, but merely intended to claim its protection to maintain authoritarian practices by stealth. For *the People’s Party*, the counter-revolution movements constituted a political crisis jeopardising the survival of the new regime. Thus, it was necessary to have an emergency law, which ‘[promoted] a belief in the constitution, [provided] protection for its principles, and [helped] the people understand the notion of constitutionalism.’<sup>253</sup> *The Act for*

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<sup>247</sup> Baker and Pasuk, *A History*, pp 123-124; ปรีดี พนมยงค์ [Pridi Banomyong], จงพิทักษ์เจตนารมณ์ประชาธิปไตยสมบูรณ์ของวีรชน 14 ตุลาคม [Safeguarding the democratic will of the 14 October Heroes] (Saitarn Press 2000), pp 76-77.

<sup>248</sup> Ferrara, ‘Unfinished Business’, p 21.

<sup>249</sup> The Announcement of the *People’s Party* No.1

<sup>250</sup> See Sections 14, 52, 61 of the 1932 Constitution; Sections 13, 72, 87 of the 1946 Constitution

<sup>251</sup> For further details see Nattapoll Chaiching, ‘The Monarchy and the Royalist Movement in Modern Thai Politics, 1932-1957’ in Ivarsson and Isager (eds), *Saying the Unsayable*.

<sup>252</sup> Baker and Pasuk, *A History*, pp 123-124.

<sup>253</sup> Scott Barmé, *Luang Wichit Wathakan and the Creation of a Thai Identity* (ISEAS 1993), p 110.

*the Protection of the Constitution* (‘the 1933 Act’), consisting of merely six articles, was drafted in 1933 to serve these purposes. Under Articles 4 to 6, preventive detention without trial, for up to ten years, could be imposed by a committee of five officials appointed by the government against anyone suspected of conspiring to overthrow the constitutional regime. Before this committee, the defendant had no guaranteed right to legal representation, and its verdict could not be appealed or reviewed by the judiciary. Such power was deemed essential for suppressing the royalist-conservatives—many of whom were banished and detained in a remote, malaria-infested area in the South.<sup>254</sup>

Yet, regardless of the number of military takeovers the country has experienced in the past eighty years, it is still obvious that Pridi at least succeeded in making the concept of constitutionalism, especially the principle of legality, parliamentary democracy together with popular sovereignty, irresistible in Thai politics.

## **6. Sarit Thanarat’s despotic paternalism: the Thai-style Schmittian model of constitutional emergencies**

As briefly discussed in Chapter 1, between 1932 and 1946, the monarchy was at its nadir. However, the traditional notion of authority was successfully restored in the late 1950s with the assistance of Sarit Thanarat, who became the PM in 1958 through two coups in 1957. To comprehend the successful restoration of *Thai-ness* under Sarit’s rule which significantly cultivates *constitutional saṃsāra*, I need to first explain elite infighting between the following main factions: (a) Pridi Banomyong’s civilian, pro-democracy wing of *the People’s Party*; (b) its ultra-nationalist military clique of *the People’s Party* led by Phibun; and (c) the royalist-conservative camp led by some old princes and top bureaucrats. This also involves the embracement of right-wing constitutional theory. Then, I explain the key features of the royal authoritarian regime implemented by Sarit.

### ***6.1 The 1947, 1957, and 1958 coups: Thai-ness restored***

Phibun assumed his premiership in 1938. Inspired by the rise of far-right politics in Europe, he later presented himself as a charismatic Buddhist leader uniting every Thai (*Phu Nam* or Führer), jettisoning *the People’s Party*’s aspiration of establishing liberal constitutionalism in Thailand. In this respect, given the long-entrenched *Thai-ness* tradition, the anti-monarchist Phibun did not totally negate the elements of ‘nation’ and ‘religion’ (Theravada Buddhism), but sought to replace that of ‘the monarchy’ with *Phu Nam*. The Asia-

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<sup>254</sup> นัยนา หงษ์ทองคำ [Naiyana Hongtonhkum], ‘พระบาทสมเด็จพระปกเกล้าเจ้าอยู่หัวและคณะราษฎร’ [‘King Prajadhipok and the People’s Party’] (Master of Art Thesis, Chulalongkorn University 1977), pp 178-180.

Pacific War broke out in 1941. Phibun allied Thailand with Japan. Pridi dissented and formed a secret alliance with the Allies and the anti-Japanese royalist-conservative groups. Following Japan's defeat, the Allies recognised Pridi's resistance, forcing Phibun to temporarily step down, paving the way for Pridi's premiership and the restoration of liberal democracy in 1946. However, the political crisis matured when King Ananda (1934-1946) was mysteriously found dead in his bedroom in June 1946, and King Bhumibol (1946-2016) succeeded his elder brother. With Phibun's support, the royalists, sceptical of Pridi's leftist ideology and the growing number of leftist political parties, turned against Pridi accusing him of planning regicide and forced him to resign. This culminated in a coup in 1947 led by Phibun's military clique and the royalist-conservatives, ousting the succeeding government of Pridi's right-hand man, Thawan Thamrongnawasawat. Pridi went into exile in China, while Phibun reassumed the premiership in 1948.

The 1947 takeover was the first time that the conservative elites allied themselves with the military to undermine liberal democracy, criticised for having bolstered interests of corrupt politicians and political romanticism. Yet, due to the presence of anti-monarchist, Phibun, the former chose to attempt to harmonise democracy with royal hegemony. Most importantly, the coup fundamentally altered Thailand's public law landscape by leaving legacies essential for restoring and maintaining royalist dominance/the hegemony of *Thai-ness*. From 1949 onwards, every Thai constitution has consistently declared that Thailand adopts '*the Democratic Regime with the Monarchy as the Head of the State*' ('the DRMH'). This provision is based on a logic of *Thai-ness* which accommodates room for 'good men' who stand 'on top of the realm of politics' to oversee the usual political life of the nation deemed as corrupt and partisan.<sup>255</sup> According to Thongchai, the DRMH functions as 'a euphemism for royalist dominance over the regular government, be it a democracy or military rule'.<sup>256</sup> Above all, as McCargo observes, the DRMH in Thai politics in 1947 was reinforced by the building of a network of conservative elites, including top military personnel, senior bureaucrats, and retired senior judges, within the constitutional institutions, notably the Senate.<sup>257</sup> For seven decades, some of these elites have attempted to reinforce the traditional concept of authority and stability by asserting tacit political influence over modern institutions, especially the military, and played a key role in reminding them of their allegiance to *Thai-ness* and in condemning politicians as corrupt.<sup>258</sup>

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<sup>255</sup> Thongchai Winichakul, 'Toppling Democracy' (2008) 38 JCA 11, pp 15, 20, 24.

<sup>256</sup> Thongchai Winichakul, 'The Monarchy and anti-monarchy: Two elephants in the Room of Thai Politics and the State of Denial' in Pavin (ed), "*Good Coup*", p 84.

<sup>257</sup> McCargo, 'Network Monarchy', p 500.

<sup>258</sup> Duncan McCargo and Ukrist Pathmanand, *The Thaksinization of Thailand* (NIAS Press 2005), p 130.

Sarit played a vital role in helping Phibun and the traditional elites topple Pridi and Thawan, and was later appointed as Commander of the Royal Thai Army in 1954. Having been aware of the rising power of the royalist-conservatives and their attempt to institutionalise the DRMH, Phibun relentlessly sought to minimise their role in politics. For example, he strove to reinforce his popularity through liberal democratic means, including by permitting political parties' activities and rigging a general election in February 1957. Phibun won but this malpractice severely damaged his legitimacy, leading to strong popular disquiet. The royalist-conservative elites saw this as an opportunity to overthrow Phibun's government by forming an alliance with Sarit. Backed by the royalist clique, Sarit claimed that the rigged election and the security of the throne justified a military putsch and a declaration of martial law, ousting Phibun on 16 September 1957. King Bhumibol was later asked for a royal proclamation to appoint Sarit guardian of the capital. Sarit mounted another coup d'état, and declared an emergency on 20 October 1958, which eventually replaced parliamentary democracy with the regime of 'despotic paternalism' known among scholars as the Thai-style democracy ('TSD'), which is the militarisation of the DRMH, by prioritising stability and unity embodied by a strong leader over pluralism, the protection of human rights and the principle of legality.

### ***6.2 The key features of despotic paternalism***

To implement the TSD, Sarit later issued the 1959 Constitutional Charter, comprised of merely 20 Sections, subsequently approved by the king on 28 January 1959, which left the Privy Council intact.<sup>259</sup> The Charter not only abolished the parliamentary system and all political rights, but also included Section 17 ('M-17') which established an emergency regime aimed at protecting national unity under *Thai-ness*. This provided:

*'During the application of this Charter, in the case where [the PM] contemplates the necessity to prevent or repress any threats to national security or the throne; or other threats which undermine, disturb, or imperil peace either occurring inside or stemming from outside the Kingdom, he, through Cabinet resolution, shall hold an authority to issue any order or act whatsoever. Such an order and act are deemed to be lawful ...'* (my translation)

In general, it was apparent that the TSD was largely inspired by the rightist ideas of 'collectivism' and 'strong leadership' embraced by Phibun, also highly compatible with the mindset of his new patrons the conservative royalists, that liberal ideas contradict the traditional Thai concept of the nation—the tradition of benevolent ruler.<sup>260</sup> His closest advisor, an

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<sup>259</sup> Section 4

<sup>260</sup> Frank C. Darling, 'Marshal Sarit and Absolutist Rule in Thailand' (1960) 33 *Pacific Affairs* 347, pp 350-352.



architect of the TSD and one of Phibun's former confidants Luang Wichitwathakan ('Wichit'), was critically aware of the modernisation process and therefore recognised that the European rightist constitutional theory, the school with which Schmitt was strongly associated (though Wichit neither invoked Schmitt's name, nor was intentionally 'Schmittian'), would be useful and compatible with *Thai-ness*, especially for dealing with enemies of the state particularly the radical leftists.<sup>261</sup> Another key legal advisor, Yud Sang-Uthai, who served as the Secretary General of the Council of State, was in fact a former student of Carl Schmitt during his time in Berlin, and formally used Schmitt's constitutional thought to articulate the Thai concept of constitutional law.<sup>262</sup> The wordings of M-17 also originated from those of Article 16 of the 1958 French Constitution, which was inspired by Article 48 of the Weimar Constitution.<sup>263</sup> I, therefore, agree with Draper that Sarit's rule reflected the essence of Schmitt's approach, though with slight differences, and that such 'Schmittian' political logic, as Connor observes, has been cultivated within the Thai constitutional order.<sup>264</sup> The fact that both Schmitt's approach and the Thai tradition of 'benevolent despotism' each favour a realist stance enables them be combined. Here, four key features of the TSD can be summarised.

Firstly, similar to Schmitt's ideal, the true spirit of the constitution, under the TSD, concerns 'a strong state' *qua* the political unity of the (Thai) people. Meanwhile, popular sovereignty, as Dressel notes, '[is] not exercised by the people directly but "realized" through the modernized state.'<sup>265</sup> Put simply, this reflects the traditional Thai view that a written constitution constitutes merely a set of rules, which even possibly hinder the task of safeguarding national security undertaken by a person of great virtue.<sup>266</sup>

Accordingly, and secondly, the TSD parallels Schmitt's CoP and his concept of concrete order, in that, it similarly advocates extra-normative authority to distinguish 'friends' from 'enemies' to realise political homogeneity. Sarit applied *Thai-ness* to indicate who and what counted as public enemies. In this fashion, a coup d'état together with martial law declaration, were then justified as acts carried out with good intention or, in the Buddhist term,

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<sup>261</sup> Barmé, *Luang Wichit*, p 78; Ferrara, *Political Development*, pp 111-112, 155.

<sup>262</sup> Streckfuss, *Truth*, p 352; หยุต แสงอุทัย [Yud Sang-Uthai], 'เราจะตั้งต้นเป็นประชาธิปไตยที่ไหน?' ['Where should democracy begin?'] in หนังสืออนุสรณ์งานพระราชทานเพลิงศพ ศาสตราจารย์หยุต แสงอุทัย [Yud Sang-Uthai's funeral memorial book] (Borpitkanpim 1979).

<sup>263</sup> Cindy Skach, *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic* (PUP 2005), p 104.

<sup>264</sup> Michael K. Connors, 'Liberalism, authoritarianism and the politics of decisionism in Thailand' (2009) 22 *The Pacific Review* 355, pp 366-367; John Draper, 'Paternalism, the Führerprinzip, and the Psychology of Authoritarian Leadership in Thailand' (*Prachatai*, 2 November 2015) <<http://www.prachatai.com/english/node/5578>> accessed 10 December 2016.

<sup>265</sup> Dressel, 'When Notions', p 459.

<sup>266</sup> Ginsburg, 'Constitutional afterlife', pp 88-89.

‘good Karma’. The TSD, we can conclude, implies two types of political enemy—the *anti-Thai* and the *un-Thai*.<sup>267</sup> Put another way, *Thai-ness* played a crucial role, as in the context of European imperialism in the mid-19<sup>th</sup> century, as an institution in determining the existence of a normal situation by distinguishing ‘what is identified as Thai’ (the *positive* identification of *Thai-ness*) from ‘otherness’ (the *negative* counterpart).<sup>268</sup> The term ‘*anti-Thai*’ signifies any foreign ideologies threatening political unity under *Thai-ness*, in particular, liberalism and parliamentary democracy. Meanwhile, the term ‘*un-Thai*’ connotes Thais who pose a challenge or repudiate *Thai-ness*. Only Thais who accept or do not outwardly oppose such unity belong to the community, whilst those expressly sceptical about ‘sovereign authority’ declare themselves to be enemies. In the 1960s, Sarit employed M-17 to detain without trial and even order the public execution of his leftist, pro-democracy political rivals, accusing them of potentially instigating political instability and even of being communist.<sup>269</sup>

Nevertheless, Sarit was quite aware of the irreversible process of modernisation in Thailand. Due to the 1932 Revolution, a return to the pre-1932 regime would have meant formally bestowing political power upon mere persons or factions, thus undermining his effort to legitimise the 1957 and 1958 coups through popular acclaim.<sup>270</sup> Meanwhile, given Thailand’s sympathy with the Capitalist Bloc during the Cold War, it was almost impossible for the right-wing conservatives absolutely to negate liberalism. Moreover, since the *Thai-ness* tradition was resurrected in the presence of nascent democracy and electoral politics, popular disquiet could be anticipated—protest against Phibun’s rigged election in 1957 for example. Recognising these developments, Sarit followed King Chulalongkorn’s approach seeking to preserve *Thai-ness* by connecting *Karma* to the increasing disenchantment of the world, particularly the nation-state together with its constitutional order and the existential concept of democracy. This reflects the third and fourth features of the TSD.

With respect to the third feature of the TSD, Thak observes that by portraying the monarchy as the embodiment of *Thai-ness*, Sarit and his supporters then asked the king for a royal proclamation (though he was not involved in a coup plot, and it was Sarit who initially declared an emergency and wielded M-17) to legitimise his authority.<sup>271</sup> In this fashion, a prominent Thai constitutional scholar, Borwornsak Uwanno then regards the monarch as the

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<sup>267</sup> Cf David Streckfuss, ‘The End of the Endless Exception?: Time Catches Up With Dictatorship in Thailand’ (*Cultural Anthropology*, 23 September 2014) <<http://www.culanth.org/fieldsights/567-the-end-of-the-endless-exception-time-catches-up-with-dictatorship-in-thailand>> accessed 24 April 2016.

<sup>268</sup> Thongchai Winichakul, *Siam Mapped: A History of the Geo-Body of a Nation* (UHP 1994), p 5.

<sup>269</sup> See Baker and Pasuk, *A History*, pp 172-173.

<sup>270</sup> Dressel, ‘When Notions’, p 458.

<sup>271</sup> Thak, *The Politics of Despotic Paternalism*, p 206.

sovereign who wields sovereign authority in the name of the Thai people.<sup>272</sup> Accordingly, Sarit could legitimately assert a *democratic* mandate when royal approval was granted on their advice to the 1957 coup and the installment of the TSD in 1958-59.

However, and fourthly, the nascent seed of liberalism forced Sarit to employ the vestige of the liberal technique—the concept of constitutionality—to stabilise his authoritarian rule. Thus, according to Yano, where Pridi sought to implement ‘constitutional idealism’ and ‘liberal constitutionalism’ in 1932, Sarit reduced it to merely ‘formalistic constitutionalism’ when a written constitution was turned into merely a document for legitimising his authority.<sup>273</sup> The latter clearly decided to constitutionalise the TSD shortly after his coup, rather than to rule exclusively under the mandate of the king’s royal sanction and coup decrees, through the promulgation of the 1959 Charter. This denotes the importance of a closed and impersonal system of legal norms in rationalising and stabilising *Thai-ness*, and in offering a legal-technical cloak of legitimacy insulating the regime itself and any emergency powers invoked from any legal challenges by liberals.

Sarit held the office of PM until his death in 1963 and left an important legacy. His revival of *Thai-ness* largely bolstered the monarchy’s political status, and has turned the Thai military into what Chambers and Napisa call a ‘monarchised military’, playing a predominant role in protecting *Thai-ness* through coups and martial law.<sup>274</sup> Nevertheless, given that this tradition was restored after 1932, it can no longer resist its democratisation and constitutionalisation. While the previous section and this section examine the attempt to entrench liberal democracy and constitutionalism and the restoration of *Thai-ness* respectively, the next section is concerned with their contestation in post-Sarit era and the role of the monarchy in arbitrating the PCLD.

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<sup>272</sup> บวรศักดิ์ อุวรรณโณ [Borwornsak Uwanon], กฎหมายมหาชน เล่ม 2: การแบ่งแยกกฎหมายมหาชน-เอกชน และพัฒนาการกฎหมายมหาชนในประเทศไทย [Public law II: the Separation between Public-Private Law and the Development of the Thai Public Law] (5<sup>th</sup> edn, Chulalongkorn 2007), p 206.

<sup>273</sup> Toru Yano, ‘Political Structures of a ‘Rice-Growing State’ in Yoneo Ishii (ed), *Thailand: A Rice-Growing Society* (CSAS 1978), pp 127, 136.

<sup>274</sup> Paul Chambers and Napisa Waitoolkiat, ‘The Resilience of Monarchised Military in Thailand’ (2016) 46 JCA 425, p 426.

## **7. The politics of gravitational pull and the King as the supreme arbitrator in times of crises**

Due to rising and recurring demands for liberal democracy/constitutionalism and electoral politics among the rising middle-class, fostered by Sarit's economic policy, his successors, as illustrated in Table 1, were forced politically to acknowledge the legitimacy of electoral politics.<sup>275</sup>

**Table 1: Coups and the restoration of liberal democracy in Thailand**

<b>Coups and martial law</b>	<b>Coup leader</b>	<b>PM/ constitution overthrown</b>	<b>Interim Constitution declared</b>	<b>Parliament/constitution restored</b>
<i>1. The 1958 Coup</i>	Sarit Thanarat	Thanom Kittikachorn/the 1932 Constitution (amended in 1952)	The 1959 Constitutional Charter	The 1968 Constitution/general election in February 1969
<i>2. The 1971 coup</i>	Thanom Kittikachorn	Self-coup/the 1968 Constitution	The 1972 Constitutional Charter	- The 14 October 1973 Uprising led to the promulgation of the 1973 Constitution restoring another experiment for parliamentary democracy in January 1974
<i>3. The 1976 Coup</i>	Sangad Chaloryu	Seni Pramroj/the 1973 Constitution	- The 1976 Massacre - The 1976 Constitutional Charter	-
<i>4. The 1977 Coup</i>	Sangad Chaloryu	Thanin Kraivichien/the 1976 Constitution	The 1977 Constitutional Charter	- Semi-liberal democracy under the 1978 Constitution - Fuller liberal democracy restored in July 1988
<i>5. The 1991 Coup</i>	Sunthorn Kongsompong	Chatchai Choonhavan/the 1978 Constitution	The 1991 Constitutional Charter	- The 1992 Black May incident - The 1997 Constitution
<i>6. The 2006 Coup</i>	Sonthi Boonyaratglin	Thaksin Shinawatra/the 1997 Constitution	The 2006 Interim Constitution	The 2007 Constitution/general election in December 2007
<i>7. The 2014 Coup</i>	Prayuth Chan-ocha	Yingluck Shinawatra/the 2007 Constitution	The 2014 Interim Constitution	The 2017 Constitution/general election date to be determined

<sup>275</sup> Wyatt regarded this circumstance as 'the paradox of Sarit's despotic paternalism'. David K. Wyatt, *Thailand: A Short History* (YUP 1984), p 285.

From Table 1, between 1968 and pre-1997, Thailand oscillated between (a) coups and military dictatorial rule under the TSD in 1971, 1976, 1977, and 1991; and (b) a multi-party parliamentary democracy. Here, two main features can be concluded.

### ***7.1 The pull of gravity between liberalism and authoritarianism: the internal perspective of the constitutional emergency model***

I initially argue that the landscape of emergency powers in the PCLD in Thailand reflects the pull of gravity between liberalism and authoritarianism. To begin with, coups and martial law were convenient means for the right-wing traditional elites and the military to repress greater demands for liberal democracy. In this fashion, four coups together with martial law declarations were imposed in 1971, 1976, 1977, and 1991, leading to the banning of political gatherings and political parties and restrictions upon press freedom. The traditional elites and the military also claimed the existence of ‘public enemies’, notably radical leftists and communists (1971 and 1976) and corrupt politicians (1971, 1976, 1991), to justify their actions, in particular, by criticising liberal democracy for its inability to address this problem.<sup>276</sup> Meanwhile, rather than choosing to rule through sovereign decisions, they also applied written constitutions, both interim (i.e., the Constitutional Charters of 1972, 1976, 1977, and 1991) and permanent which outwardly restored weak parliamentary democracy with a civilian coalition government deemed the source of political romanticism (i.e., the 1968, 1978, and 1991 Constitutions) to stabilise and institutionalise *Thai-ness* hegemony, thus preserving the possibility of a military coup. This attempt to build ‘constitutionality’ will be more comprehensively analysed in the next chapter. However, as already mentioned, greater modernisation precipitated pro-democracy movements, particularly among university students displeased with almost three decades of right-wing military domination. Overall, my key point here is that the Thai experience asks us to consider what I mentioned in Chapter 1 as the *internal* perspective of the constitutional emergency model, that is, the growing need for the Schmittian-type idea to accommodate greater demands for its Kelsenian counterpart and *vice versa*.

In 1971, the peculiar event of self-coup led by Sarit’s successor, Thanom Kittikachorn, overthrowing his own elected government, abolished the 1968 Constitution, and made a return of the TSD, fostered public discontent. This resulted in the mass protest against the junta in

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<sup>276</sup> The Revolutionary Council announcement no.1 on 18 November 1971; The National Reform Council announcement nos.1 and 5 on 6 October 1976; The Revolutionary Council announcement no. 1 on 20 October 1977; the National Peace Keeping Council announcement no.1 on 23 February 1991.

October 1973 by university students and many middle-class people, demanding the restoration of liberal constitutionalism and electoral democracy. The political crisis reached its zenith on 14 October 1973 when the military used martial law power sustained since the 1971 coup to disperse protesters, causing violence, acts of vandalism and deaths. Rather than appeasing the situation, the wielding of martial law in 1973 and the deployment of troops under the justification of the protection of *Thai-ness* enraged the protesters, resulting in one of the bloodiest conflicts between civilians and military officials in modern Thai history. Tanks, helicopters and rooftop snipers were sent to massacre protesters, causing more than 36 hours of chaos, whilst the people fought back using guns seized from some officers and ramming buses into the military.<sup>277</sup> The 1973 uprising was the first time ‘that the government was overthrown by extra-bureaucratic forces through street politics, and not through clientelistic ties.’<sup>278</sup> This incident made it obvious that permanent military rule no longer enjoyed popular legitimacy, and largely ‘shook the structure of relations of power in Thai society.’<sup>279</sup>

However, the heyday of liberal politics between 1973 and 1976, in turn, encouraged some leftist university students and politicians, dissatisfied with social and economic inequality, to agitate for greater political inclusion and democracy, causing protests and instability. Aware of the threat to their hegemonic position, some ultra-rightist conservatives eventually reacted harshly, resulting in the *6 October 1976 massacre*. The communist triumph in Laos (May 1975), Cambodia (April 1975), and Vietnam (April 1975) had further heightened their fear that their leftist opponents would overthrow the monarchy. Aimed at antagonising their opponents, some right-wing elites were believed to support Thanom, now ordained as a Buddhist novice, to return to Thailand in 1976, causing thousands of university students to launch another protest. Regarded as ‘*un-Thais*’, these pro-democracy leftists were accused of being communists, and were eventually brutally attacked and killed at Thammasat University at 8.00 am on 6 October 1976 by far-right paramilitaries, using live rounds, bazookas and rocket launchers, especially Village Scouts and other far-right groups, and other state forces, notably the police. This incident paved the way for another coup and a declaration of emergency the same day, claiming the need to protect *Thai-ness*. Approximately 36 people were reportedly killed, while more than 3,000 were arrested.<sup>280</sup> After the bloody massacre and an internal

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<sup>277</sup> George N. Katsiaficas, *Asia's Unknown Uprisings: People power in the Philippines, Burma, Tibet, China, Taiwan, Bangladesh, Nepal, Thailand and Indonesia, 1947-2009* (PM Press 2013), p 308.

<sup>278</sup> James Ockey, ‘State, bureaucracy and polity in modern Thai politics’ (2004) 34 JCA 143, p 144.

<sup>279</sup> Thongchai Winichakul, ‘The Changing Landscape of the Past: New Histories in Thailand Since 1973’ (1995) 26 JSAS 109, p 101.

<sup>280</sup> Sudarat Musikawong, ‘Thai democracy and the October (1973–1976) events’ (2006) 7 Inter-Asia Cultural Studies 713, p 713.

conflict within the right-wing government established in 1976, which led to another putsch in 1977, Thailand entered the era of ‘semi-liberalism’. By 1978, Thai conservative elites, noticing the decline of the communist threat and realising a growing public appetite for popular democracy, enacted the new constitution establishing semi-liberal democracy—multi-party liberal democracy under the tutelage of the network of the traditional elites, operating under *Thai-ness* hegemony. The former army chief, Prem Tinsulanonda, was appointed PM by the king in 1980. Prem initially enjoyed significant support from the bureaucrats, the military, the people, and the palace. Nevertheless, corruption scandals together with greater demands for fuller democracy forced Prem to dissolve Parliament in 1988.

After the general election in 1988, a civilian coalition government was formed by Chatchai Choonhavan. Chatchai’s attempt to take control of the military made his premiership vulnerable. The military eventually overthrew Chatchai and declared martial law in 1991, citing corruption and threats to *Thai-ness* as justifications.<sup>281</sup> Greater demands for popular sovereignty, democratic constitutionalism and good-governance, supported by globalisation and the end of the Cold War, forced the junta to organise a general election later in March 1992. However, the majority of the new Parliament chose as PM, Suchinda Kraprayoon, the member of the 1991 junta who intended to turn the clock back to semi-authoritarianism like in the 1980s. In May 1992, public discontent culminated in another mass demonstration in Bangkok, this time a crowd of approximate 200,000 people, and caused another emergency and political crisis.<sup>282</sup> Between 17 and 18 May 1992, Suchinda deployed military forces to disperse protesters, resulting in violence, acts of vandalism and deaths, which enormously decreased the government’s legitimacy—52 were reportedly killed, while 293 went missing, and thousands more were arrested or injured, an incident notoriously known as *Black May*.<sup>283</sup>

In sum, it can be concluded that given the rise of the middle class, the more the military strove to prolong its ‘emergency regime’, the more it had to struggle with mass demands for constitutionalism and liberalisation. However, despite its demands, liberalism could not prevail due to the country’s strong tradition of *Thai-ness*. As Ferrara notes, it therefore appeared that the rhetoric of a threat to *Thai-ness* and the accusation of political romanticism

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<sup>281</sup> The Order of the National Peace Keeping Council No 1

<sup>282</sup> Khān Thirawit, *Thailand in Crisis: A Study of the Political Turmoil of May 1992* (Thailand Research Fund 1997), p 24.

<sup>283</sup> Ibid, p 55.

*‘become politically activated when democracy begins to work as intended—that is, when elected governments begin to promote greater popular participation, expand their authority over matters, such as policy making and appointments, traditionally reserved for officials in the military and civilian bureaucracy.’*<sup>284</sup>

## **7.2 The King as the ultimate arbiter**

Another key feature of emergency powers in the PCLD in pre-1997 Thailand concerns the role of the king. On the one hand, since Sarit’s rule, coups d’état, recalling Borwornsak’s argument in Section 7.2, had to be endorsed by the king, deemed to be the embodiment of the Thai nation, on the advice of the leaders of the junta. In this fashion, the royal blessing, as Dressel puts it, therefore provides a ‘source of legitimacy and object of legitimation.’<sup>285</sup> The failure to consult the king for his blessing significantly undermined a coup attempt. Two attempts to topple Prem’s government in 1981 and 1985 exemplified this. The coups failed after their leaders, though capable of taking control of Bangkok, were unable to secure a blessing from the king who, on both occasions, was advised by Prem to stay outside Bangkok. Also, it was King Bhumibol who intervened and halted the violence in 1973 and 1992. Despite the royal blessing to which Thanom referred to justify the 1971 coup, the king surreptitiously asked Thanom to resign and flee the country. Popular democracy was restored by the new 1974 Constitution. Likewise, King Bhumibol ultimately intervened to prevent the country’s fragmentation in 1992 by summoning Suchinda and the protest leader, Chamlong Srimuang, asking them to compromise. The violence suddenly ended, and Suchinda resigned.

According to the aforesaid roles, McCargo rightly concludes that in Thailand, ‘the monarchy was the primary source of national legitimacy; the King acted as a didactic commentator on national issues, helping to set the national agenda’.<sup>286</sup> Put simply, the above incidents confirmed the status of the monarchy as ‘the supreme political referee’. However, although royal sovereign authority could reinforce the implementation of the PoA, *Thai-ness* simultaneously reinforced by it was, in turn, exploited by some elites and the military to undermine liberalism. I will comprehensively assess this issue in Chapters 3 and 4 in the light of the Kelsen-Schmitt debate.

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<sup>284</sup> Ferrara, *The Political Development*, p 271.

<sup>285</sup> Dressel, ‘When Notions’, p 449.

<sup>286</sup> McCargo, ‘Network monarchy’, p 501.



## **8. Contestation and institutionalisation**

As we can see, a standard feature of Thai politics before 1997 mirrored the contestation between liberal and conservative forces, precipitating *constitutional saṃsāra*. Two main trends can be observed. Firstly, from the perspective of cognition/authority ‘*is*’, royally-blessed coups and martial law, rather than emergency legislation, were convenient means for the traditional elites and the military to resolve what they deemed to be the PCLD. Secondly, from the realm of value ‘*ought*’, the anti-liberal conservative regime however had to accommodate a greater space for liberal democracy. This led to a growing connection between the two realms. Given the recurrence of coups at the presence of greater liberal demands, it was also apparent that these elites nevertheless succeeded in:

(a) connecting *Thai-ness* with modern ideologies, in particular, the modern state, the notions of (formalistic) constitutionalism (i.e., the constitution-making process) and (identitarian) democracy; and

(b) institutionalising *Thai-ness* and therefore ‘sovereign authority’ in the presence of struggles against liberalism.

A resort to extra-normative measures guaranteed some level of political stability—at least in the sense that it did not counter-productively precipitate an anti-coup reaction. However, I will show in the next part that the greater the aforesaid liberal demands, the more the declining legitimacy of extra-normative emergency powers.

### **Part 3: Emergency powers in Thailand and the colour-coded crises**

Military brutality in the 1992 Black May incident galvanised a vocal demand for liberal democracy from the public in general, making constitutional reform inevitable. With strong popular support, the new constitution was promulgated in October 1997. The so-called ‘*People’s Constitution*’ has therefore reshaped the contours of the PCLD and emergency powers applied therewith. Below, I initially explore the 1997 Constitution in the context of the Kelsen-Schmitt debate before discussing Thaksin Shinawatra’s premiership which triggered contemporary colour-coded politics. Then, in Section 12, I focus on the key provisions of the 2007 Constitution imposed by the 2006 junta to reinforce *Thai-ness*, and ultimately explore, in Section 13, emergency powers invoked to deal with the colour-coded crises between 2008 and 2014

#### **9. The explicit adoption of ‘Kelsen’ in 1997 and Thaksin Shinawatra’s premiership**

Constitutional reform in 1997 has significantly redrawn the relationship between progressive and conservative forces, including the use of emergency powers, in Thailand. On the one hand, the 1997 Constitution preserved the hegemony of *Thai-ness*. Nevertheless, in essence, it also challenged the traditional establishment by explicitly adopting Kelsen’s theory of liberal constitutionalism, notably his model of a constitutional court, the legacy of which has lasted even after the constitutional text was shredded as a result of the 2006 coup. Below, I elaborate the key features of this constitution related to the issue of emergency powers.

The 1997 Constitution, on the one hand, preserved *Thai-ness* hegemony by outwardly declaring that the country adopts the DRMH, and declared that the Buddhist monarchy is the embodiment of the Thai people, occupying a position of revered worship which cannot be violated.<sup>287</sup> However, it still left a network of traditional elites intact, allowing them to continue asserting influence on the bureaucracy, the military, and the judiciary.<sup>288</sup> It also explicitly stipulated that every Thai citizen is under a duty to uphold the DRMH, and prohibited any motion of constitutional amendment altering it.<sup>289</sup> The 1997 Constitution also reflected a mistrust of politicians—its drafters accused the country’s past coalition governments of generating political romanticism or an endless bargaining for political power among different interests that, in turn, facilitated ‘under-the-table’ corruption.<sup>290</sup>

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<sup>287</sup> Sections 2, 3, 8 and 9

<sup>288</sup> Sections 13-14

<sup>289</sup> Sections 66, 313

<sup>290</sup> Before 1997, Thailand had never had a democratically elected PM capable of serving a full four-year term. See Borwornsak Uwanno and Wayne D. Burns, ‘The Thai Constitution of 1997: Sources and Process’ (1998) 32 UBC Law Review 227, p 236.

Notwithstanding its conservative elements, the 1997 Constitution introduced numerous positive innovations into Thailand's constitutional landscape, significantly affecting the status of a military putsch. As mentioned, its drafters held conservative concerns about the lack of good governance associated with party politics, which had provided a justification for military takeovers abolishing liberal parliamentary democracy since 1947. But, given that the 1992 incident reflected rising anti-military attitudes in combination with greater demands for liberal democracy, the 1997 Constitution simultaneously and explicitly accommodated a greater commitment to a Kelsen-type liberal constitutionalism. Its drafters then sought to kill two birds with one stone.

Above all, the new constitution created a full-time Constitutional Court based on the Kelsenian model, assigned not only with the task of ensuring the constitutionality of Acts of Parliament, but also with hampering future coups and uses of emergency powers, which constitute a violation of the democratic constitution according to Kelsen's theory.<sup>291</sup> Put simply, the 1997 Constitution sought to entrench in full the PoA—the creation of the institutional condition under which the conformity of exercises of state power with a written constitution and its basic organisational principles is ensured. For the first time, these actions were declared under Section 63 as attempts to acquire political power by extra-normative means, and the Thai people were granted the right to resist such action. I will assess the role of the Thai Constitutional Court under this provision during the colour-coded crises in full in the next chapter. At least, we can observe that the reform in 1997 has dramatically altered the profile of what counts as 'norm' and 'exception' as the 1997 Constitution, though retaining royal hegemony and failing to prevent the coup in 2006, has significantly enhanced anti-coup and anti-aristocratic sentiments and raised public consciousness of liberal-democratic ideas among broader sections of Thai society.<sup>292</sup>

By encouraging both stable politics and the sense of popular sovereignty, the 1997 Constitution facilitated the rise of Thaksin Shinawatra in 2001. Thaksin's populist policies, notably, universal healthcare, village-managed development funds, and a debt moratorium for agriculture, attracted significant public support.<sup>293</sup> His *Thai-Rak-Thai* party ('TRT'), comprising a number of progressive intellectuals and politicians, was re-elected in 2005 with an absolute majority in the House of Representatives. However, Thaksin was simultaneously

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<sup>291</sup> Tom Ginsburg, 'Constitutional courts in East Asia' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law in Asia* (Edward Elgar 2014), p 73.

<sup>292</sup> Frank Munger, 'Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand' (2007) 40 *Cornell Int'l L.J.* 455, pp 465-472.

<sup>293</sup> Ferrara, *The Political Development*, pp 223-225.

criticised for his assertive and bold style of leadership and was afflicted by numerous corruption scandals. As Ferrara notes, he tended to favour unconstrained authority—an idea rooted in *Thai-ness*.<sup>294</sup> He was also accused of having used his wealth to turn smaller political parties, the Senate, and other independent bodies such as the Election Committee, into his ‘stooges’. During Thaksin’s premiership, the phenomenon of ‘husband-and-wife Parliament’, whereby spouses and relatives served as members of either the Lower or Upper Houses, occurred.

Thaksin’s premiership is however paradoxical, and graphically illustrates the clash between the Schmittian ideology and its Kelsenian alternative in contemporary Thailand. Though popularly elected and seeking to justify his rule through the rhetoric of constitutionalism, his assertive style of leadership has preserved the core ideology of the TSD, namely strong and unchecked authority, within Thailand’s constitutional landscape.<sup>295</sup> Yet, by drawing his legitimacy ‘from below’ and from the 1997 Constitution, Thaksin reinforced the status of liberal democracy as the basis for political legitimation, supporting a growing concern for it among vast segments of Thai society.<sup>296</sup> The popularity of Thaksin has challenged royal hegemony, worrying the royalist-conservative elites and many middle-class people in Bangkok, many of whom, such as Chamlong Srimuang, turned against the very ‘liberal aspirations’ they fought for in 1992 fearing that liberalism strengthened the interests of the uneducated, short-sighted rural masses, who supported Thaksin’s premiership.

In short, a post-1997 stable political environment, or the *Nirvana* of *constitutional saṃsāra*, was merely temporary.<sup>297</sup> The anti-Thaksin alliance was a starting point for a series of colour-coded political crises and numerous uses of emergency powers in response to political unrest, marking a return of *constitutional saṃsāra*. The next section will explore these as a raw conflict of political interests between those inclining to advocate Schmittian and Kelsenian positions.

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<sup>294</sup> Ibid, p 221.

<sup>295</sup> Andrew Harding, ‘The politics of law and development in Thailand: seeking Rousseau, finding Hobbes’ in Gerald Paul McAlinn and Caslav Pejovic (eds), *Law and Development in Asia* (Routledge 2012), p 130.

<sup>296</sup> Dressel, ‘When Notions’, p 458.

<sup>297</sup> In Buddhism, *Nirvana* means the release from the cycle of rebirths.

## **10. The ‘colours’ in Thailand: the external perspective of the constitutional emergency model**

The conflict between Thaksin and the traditional elites is normally, yet superficially, seen as the cause of Thailand’s contemporary colour-coded politics, which began in 2006.<sup>298</sup> These incidents mirror a series of political crises between the royalist ‘Yellow’ and the pro-democracy ‘Red’ factions. The Yellow faction is conspicuously pro-monarchy and anti-Thaksin. It comprises an alliance of the royalist-conservative elites, senior technocrats, and the military, several MPs of the liberal-conservative Democrat Party (‘DP’), and the upper middle classes in Bangkok and the South. Its masses were known as the People’s Alliance for Democracy (‘PAD’) or the Yellow Shirts between 2006 and 2008 and as the People’s Democratic Reform Committee (‘PDRC’) between 2013 and 2014.

By contrast, the Red faction or the United Front for Democracy against Dictatorship (‘UDD’) is viewed, especially by the PAD, as the pro-Thaksin faction since many of its supporters are former TRT politicians and the rural masses especially from the TRT’s base in the North and the Northeast, and some urban poor. The conflict between the Yellows and Reds led to periods of political instability, mass protests, violence, and acts of vandalism against each other. Emergency powers, including two coups in 2006 and 2014, were vital tools used by both the Red and Yellow factions and by the Yellow military to restore stability.

Nevertheless, describing the political crises in this way limits our focus almost exclusively to the realm of politics and political interests, and ignores the issue of competing values concerning legal authority. Besides, the Red faction also comprises other groups, notably leftist scholars, not affiliated with Thaksin, while there are also movements other than the UDD struggling for liberal constitutionalism.<sup>299</sup> Thus, it is more beneficial to describe the Red and the Yellow factions in the light of two competing conceptions of state authority and political crisis.

Using the key slogans, ‘Thaksin sells the nation’ (i.e., Thaksin is ‘evil’), ‘We will fight for the monarchy’, and ‘Returning sovereignty to the monarchy’, the Yellow faction attempted to ensure royal hegemony. Many of them even labelled liberal democracy as the source of political instability and supported the imposition of royalist coups and martial law to topple the

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<sup>298</sup> E.g., Andrew Harding and Peter Leyland, ‘The Color of Thailand’s (Un)Constitutional Reforms: Red, Yellow, or Orange?’ in David K. Linnan (ed), *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (Routledge 2012).

<sup>299</sup> Aim Sinpeng and Erik Martinez Kuhonta, ‘From the Street to the Ballot Box: The July 2011 Elections and the Rise of Social Movements in Thailand’ (2012) 34 CSEA 389, pp 397-398; See Duncan McCargo, ‘Branding Dissent: Nitirat, Thailand’s Enlightened Jurists’ (2015) 45 JCA 419.

Shinawatra camp and other UDD supporters.<sup>300</sup> By contrast, the Red faction supported Pridi Banomyong's aspiration in 1932. It is related to recurring demands for the protection of rights and liberties by a democratic constitution such as the 1997 Constitution, and to anti-coup sentiment. Yet, as I will later show, such a position has also appealed to the Yellow Shirts, especially when emergency powers were imposed upon them.

The reiteration of these competing conceptions is vital as it prompts us to rethink the absence of consensus in the Thai political landscape. As analysed in Chapter 1, a successful implementation of Kelsenian liberal constitutionalism visibly requires members of any given society, by and large, to see liberalism as a value with intrinsic worth. Likewise, a shared belief in 'homogeneity', i.e., collective identity, is essential for the realisation of the Schmittian existential concept of the constitution. Ostensibly, the coup culture signifies the absence of the former in Thailand. But, as the trends of liberalisation and democratisation have increasingly been felt in Thailand, especially after Sarit's death in 1963, there has, in turn, been a corresponding decline in sympathy for military rule, and, since the 2006 coup, of *Thai-ness*. The Red-Yellow conflict however deepens the lack of consensus. Accordingly, the colour-coded crises ask us to consider what I mentioned in Chapter 1 as the *external* perspective of the constitutional emergency model, that is, the application of emergency powers in the light of the AoH bred by the direct ideological and physical collision between liberal and right-wing conservative movements and between the attempts to reassert the political legitimacy of the Kelsenian approach and of its Schmittian counterpart against each other with no absolute winner. To clarify this point, I need to explain how the 2006 coup, ousting Thaksin, was unique compared to its predecessors.

The mass protest against Thaksin by the PAD began in January 2006. Meanwhile, Prem Tinsulanonda, a former PM and the current President of the Privy Council, made several speeches emphasising the military's loyalty to *Thai-ness*. Notwithstanding the presence of the anti-coup provision enshrined in the 1997 Constitution, the tension between the Yellow camp and Thaksin eventually culminated in the abolition of the 2006 election by the Constitutional Court (see Chapter 3) and another bloodless coup d'état on 19 September 2006 led by General Sonthi Boonyaratglin. Like his predecessors, Sonthi cited a threat to *Thai-ness* posed by the 'Thaksin regime' to justify his action, and abolished the 1997 Constitution, forcing Thaksin to escape into exile. Interestingly, Sonthi further justified the coup by castigating the subversion

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<sup>300</sup> Pavin Chachavalpongpun, "'Unity" as a Discourse in Thailand's Polarized Politics' [2010] *Southeast Asian Affairs* 332, pp 333-337.

of the 1997 Constitution by Thaksin.<sup>301</sup> Yet, although the 2006 coup toppled Thaksin's regime which had some authoritarian features and claimed to restore liberal democracy, given its intrinsic aim to reinforce the authoritarian culture and notion of political stability, it was a 'non-democratic' rather than a 'democratic' coup d'état.<sup>302</sup> Accompanied by Prem, Sonthi then asked King Bhumibol for his blessing. Later, the junta established an *ad hoc* Constitutional Tribunal to deal with charges filed by the prosecutor, accusing the TRT of providing funds for smaller parties to compete with it in the 2 April election. The Tribunal found the executive members of the TRT guilty, and ordered its dissolution in May 2007.<sup>303</sup>

However, unlike its predecessors, the 2006 takeover meant to ensure *Thai-ness* hegemony counter-productively galvanised an anti-establishment movement (the Red Shirts), formally created in October 2006—its 'leftist' individual members even professing anti-monarchy sentiments.<sup>304</sup> The Red Shirts declared themselves to be 'the guardians of democracy', and labelled the traditional elites, especially Prem, as *ammat* ('evil' aristocrats).

My point here is that the colour-coded crises have reflected the fact that Thailand is a deeply divided society. Unlike the pre-1997 period, the more the traditional elites and the Yellow Shirts attempted to solidify *Thai-ness* hegemony, particularly through harsh emergency powers, the more they were opposed by ambitious liberal demands. Media and social media have become vital for dispersing political ideas and even for inciting hatred. Contemporary Thai political crises can be interpreted in terms of a direct collision between 'Kelsenian' and 'Schmittian' notions of political legitimacy, not just at the 'interest' level, but also the 'ideological' one, with a total lack of consensus on what should constitute the hegemonic model of political legitimacy. In the next section, I observe Thailand's political landscape after the 2006 coup, especially the uses of emergency powers in response to the aforesaid direct collision, which led to mass mobilisation and atrocities.

## **11. The 2007 Constitution: reinforcing *Thai-ness* in a deeply divided society**

Following the 2006 coup, the military similarly promulgated the 2007 Constitution on 19 August 2007. This constitution clearly intended to reinforce the *Thai-ness* tradition against the rise of the Red faction. Between 2008 and 2014, intermittent efforts by the Red faction to amend the 2007 Constitution were hampered by their Yellow opponents. Accordingly, rather than pacifying the PCLD, it instead exacerbated social polarisation between the Red and the

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<sup>301</sup> Harding and Leyland, 'The Constitutional Courts', p 322.

<sup>302</sup> Cf Ozan O. Varol, 'The democratic coup d'état' (2012) 53 Harv. Int'l L.J 292, pp 298-300.

<sup>303</sup> The Constitutional Tribunal's decision no. 20-22/2549 (2006)

<sup>304</sup> Pavin Chachavalpongpun, 'Thailand's Red Networks: From Street Forces to Eminent Civil Society Coalitions' (2013) Southeast Asian Studies at the University of Freiburg Occasional Paper N° 14, pp 12-13.

Yellow, resulting in a series of mass protests and recourse to emergency powers between 2008 and 2014. Before exploring the uses of emergency powers in the colour-coded crises, it is important to examine some key provisions of the 2007 Constitution which orchestrated what counts as the norm and the exception in Thailand's constitutional landscape.

Firstly, where the 1997 Constitution, for the first time introduced a Senate with 200 members directly elected by the people in each province nationwide, the 2007 Constitution undermined the development of liberal democracy by partially re-introducing the royally-appointed Senate of 74 members (other 76 members were directly elected in each province nationwide).<sup>305</sup> Since 1947, the appointed Senate appeared in every permanent constitution of Thailand, with the exception of the 1952 and the 1997 versions.<sup>306</sup> Unlike in the West, where the Upper House is typically subordinate to the House of Representatives, the appointed Thai Senate is normally considered as 'an anti-politician stronghold', that is, as an institute functioning to implicitly castigate the Lower House as a nest of pluralistic party politics with disintegrating tendencies, thus, in effect, imprinting within the Thai constitutional landscape a picture of liberal-democratic, electoral politics as a source of political instability and even crisis.<sup>307</sup> The comprehensive study on the Thai Senate is beyond the scope of this PhD thesis. The relevant point here is that the conservative elites normally claim that the reintroduction of a royally-appointed Senate was important for preventing the phenomenon of 'husband-and-wife Parliament' as in 1997.<sup>308</sup> In practice, most of the appointed Senators, chosen from among elites closely related to the palace, military officials and some influential Yellow Shirt activists, played a vital role in ensuring royalist influences over the appointment of members of the 'watchdog' agencies, notably Constitutional Court judges, and in countering the 'evil' politicians of the 'Red' faction.<sup>309</sup> As we will see, they also played an active role in intervening in the administration under the Red government, thus indirectly affecting uses to which emergency powers were put.

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<sup>305</sup> Section 121 of the 1997 Constitution; Section 111 of the 2007 Constitution

<sup>306</sup> Sections 33 and 34 of the 1947 Constitution; Sections 82 and 83 of the 1949 Constitution; Sections 78 and 79 of the 1968 Constitution; Sections 107 and 108 of the 1974 Constitution; Sections 84 and 85 of the 1978 Constitution; Sections 100 and 101 of the 1991 Constitution; Sections 111 and 112 of the 2007 Constitution; Section 107 of the 2017 Constitution

<sup>307</sup> Allen Hicken, *Building Party Systems in Developing Democracies* (CUP 2009), pp 118-119, Eugénie Mérieau, 'The legal-military alliance for illiberal constitutionalism in Thailand' in Marco Bünte and Björn Dressel (eds), *Politics and Constitutions in Southeast Asia* (Routledge 2017), p 141.

<sup>308</sup> See the Constitutional Court Decision no.15-18/2556 (2013) below.

<sup>309</sup> Patrick Ziegenhain, *Institutional Engineering and Political Accountability in Indonesia, Thailand and the Philippines* (ISEAS 2015), pp 84-85.



Secondly, the 2007 Constitution also highlighted the growing importance of the judicialisation of politics. The 2007 Constitutional Court judges held their authority under Section 68 (previously Section 63 of the 1997 Constitution) to decide, especially during political crises, on what counts as an act threatening the DRMH. No verdict had been based on Section 63 between 1997 and 2006. As I will show in the next chapter, unlike in 1997, the Constitution Court under the 2007 constitution was clearly antagonistic to liberal parliamentary politics as it was filled by ‘pro-Yellow’ judges.<sup>310</sup> The extensive (re-)connection between the Constitutional Court and *Thai-ness* affects Section 68, and therefore emergency powers and political crises. In the next chapter, I will comprehensively compare the 2007 Constitution Court with its 1997 predecessor, in particular, the issues of the appointment system and how this was intended to insulate the court from political bias. More importantly, its judgments during the colour-coded crises will also be assessed. Having explored how the 2007 Constitution sought to reinforce *Thai-ness* and contain the Red faction, what we must explore next is their uses in the colour-coded crises.

## **12. Emergency powers and the struggle between the Red and Yellow factions**

As already indicated, the Red and the Yellow factions represent two contesting political interest groups, holding significantly opposite notions/values about political authority and legitimacy—the liberal-legalistic approach and its anti-liberal realist alternative. Though the latter still dominates Thailand’s constitutional order, influential demands for liberalism have rendered coups based on the *Thai-ness* justification illegal and also illegitimate among large sections of society. Accordingly, despite the attempts by the Yellow faction to reinforce royalist dominance after the 2006 coup, their enemies—Thaksin’s proxy political parties—won two general elections in 2007 and 2011, causing more frustration among traditional elites, revealing that the right-wing conservatives had increasingly become ‘a minority’. Such a loss, notably in 2008 and between 2011 and 2014, later resulted in a struggle, including the formation of an alliance with political pressure groups (the PAD/PDRC), to reassert their hegemony by labelling liberal democracy as a cause of political instability/crisis, provoking the use of emergency powers by the ‘Red’ government claiming democratic legitimacy. Nevertheless, when the ‘Red’ governments were rejected by the Constitutional Court leading to the military-backed ‘Yellow’ government in 2008, and by a coup in 2014, the UDD and other liberal-leaning groups denounced these acts as the mark of autocracy worsening the contemporary

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<sup>310</sup> Eugénie Mérieau, ‘Thailand’s Deep State, Royal Power and the Constitutional Court (1997-2015)’ 46 JCA 445, p 14.

political crises. Their public protests against dictatorship were normally met with actions authorised by emergency powers, drawing legitimacy from the *Thai-ness* tradition.

In total, Thailand has witnessed periodic Red- and Yellow-shirted protests against each other's government, causing occasional uses of emergency powers: (a) the PAD against the 'Red' government in 2008; (b) the UDD against the 'Yellow' government in 2009 and 2010; and (c) the PDRC against the 'Red' government between 2013 and the 2014 coup. The approximate number of protestors in each protest in Bangkok (and nationwide in 2010) ranged between 50,000 to more than 100,000. Three main forms of emergency powers were used to deal with these incidents, namely the Internal Security Act 2008 ('ISA'), the 2005 Emergency Decree on Public Administration in State of Emergency ('the 2005 Decree'), and a coup together with martial law. I will not go into comprehensive details especially of the first two pieces of emergency legislation at this moment, but will only mention their general aims. Table 2 summarises the uses of emergency powers during the colour-coded crises.

**Table 2: The uses of emergency powers by the Red and Yellow governments**

Incidents	Government	Emergency powers		
		ISA	The 2005 Decree	Coup and martial law
<b>2008 (PAD protest)</b>	Samak Sundaravej (Red)	X	O 2 September-14 September 2008 (abolished by Somchai Wongsawat)	X
	Somchai Wongsawat (Red)	X	O 27 November-9 December 2008 (abolished by deputy PM, Chaowarat Charnweerakul)	X
<b>2009 (UDD protest)</b>	Abhisit Vejjajiva (Yellow)	X	O In Bangkok: 12 April-24 April 2009; In Chonburi/Pattaya: 11 April 2009	X

<b>2010 (UDD protest)</b>		O 11 March-7 April 2010	O 7 April-22 December 2010	X
<b>2013-2014 (PDRC protest)</b>	Yingluck Shinawatra (Red)	O 25 November-31 December 2013; and 19 March-30 April 2014	O 21 January-18 March 2014	O The 2014 coup and martial law declaration by Prayuth

X = emergency powers used

O = emergency powers not used

In this section, the main focus is rather on the general circumstances in which they were applied, and upon the key actors during these crises, namely (a) the palace and the military, (b) the government, (c) the Constitutional Court, and (d) the protesters.

### ***12.1 The PAD protests against the two ‘Red’ governments in 2008***

Despite the attempt by traditional elites and the military to purge Thaksin between 2006 and 2007, the TRT’s successor party—the People’s Power Party (‘PPP’)—still won the general election in December 2007, proving Thaksin’s massive popularity with many Thais. Samak Sundaravej and his successor, Somchai Wongsawat, became PM in January and September 2008 respectively. Regarding their governments as Thaksin’s puppet, the PAD reassembled. Each PM declared an emergency in September and November 2008 which ended after the Constitutional Court had dismissed Samak and Somchai and dissolved the PPP. The Yellow Shirts declared their victory and also dissolved.

Provoked by Samak’s attempt to disqualify the banning of Thaksin and other TRT executive members by the 2006 junta, the Yellow Shirts reunited in May 2008. Compared to the pre-2006 period, the PAD’s political standpoint grew more conservative after proposing what they called ‘New Politics’, emphasising the traditional authority under *Thai-ness* and the replacement of liberal democracy and electoral politics with a ‘selectoral democracy’—thirty percent of MPs would be elected from constituencies, one per province (76 in total), and the rest would be selected from different occupations and associations.<sup>311</sup> The latter part of the proposal intended to maintain the traditional elites’ influence within Thai politics. Though appealing to less middle-class followers, the ‘New Politics’ campaign formed a strong alliance between the PAD and the traditional elites and the military.<sup>312</sup>

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<sup>311</sup> Michael H. Nelson, “‘Vote No!’ The PAD’s Decline from Powerful Movement to Political Sect?” in Pavin (ed), *“Good Coup”*, pp 147-149.

<sup>312</sup> Ibid.

On 26 August 2008, the protesters rallied and successfully occupied Government House in Bangkok, openly defying the government's order to leave, vowing to exercise their constitutional right to 'peaceful and unarmed protest', and performing their duty to protect the three pillars of *Nation-Religion-Monarchy*.<sup>313</sup> Within Parliament, the DP clearly supported the occupation, and demanded Samak's resignation. Unable to reoccupy the House, the UDD eventually launched an anti-PAD protest, and warned the military not to stage another coup. Some Red Shirts ultimately clashed with the PAD guards on the night of 1 September, causing violence, clashes and acts of vandalism, reportedly injuring 43 people and causing 1 death.<sup>314</sup> Samak then declared a state of emergency invoking the 2005 Decree, allowing the government to disperse protests. Though appointed to deal with an emergency situation, Anupong Paochinda, the royalist army commander, refused to stage a coup and even refused to disperse the protesters. Claiming that the use of the 2005 Decree would respect the principle of democracy, he asked the two sides to rely on negotiation and avoid employing violent means.<sup>315</sup>

However, it was the Constitutional Court which provisionally pacified the situation. Shortly after its rise to power, the Election Commission and 29 appointed Senators accused Samak, who was also at the time hosting two television cooking shows, of violating the provisions of the 2007 Constitution banning the PM from being employed in the private sector, and asked the Constitutional Court to annul his premiership.<sup>316</sup>

On 9 September, during a tense confrontation between the government and the PAD, the judges unanimously considered Samak's activity the work of an 'employee', thus contravening constitutional provisions against conflicts of interests.<sup>317</sup> Samak had to step down, and Somchai was chosen by Parliament as a new PM. Somchai revoked the state of emergency on 15 September.

However, as Thaksin's brother-in-law, Somchai's premiership was not tolerated by the PAD from the start. The latter kept occupying Government House and demanded Somchai's resignation. On 24 November, a convoy of the PAD proceeded illegally to occupy Bangkok's two international airports, pressuring Somchai to resign. The 2005 Decree was re-imposed on

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<sup>313</sup> Marc Askew, 'Confrontation and Crisis in Thailand, 2008-2010' in Marc Askew (ed), *Legitimacy Crisis in Thailand* (Silkworm Books 2010), p 36.

<sup>314</sup> Ibid, p 37.

<sup>315</sup> Ibid.

<sup>316</sup> Sections 102 and 182

<sup>317</sup> Constitutional Court Decision no. 12-13/2551 (2008)

27 November. Somchai appointed Anupong to resolve the emergency. As in September, the latter declined to follow Somchai's command.<sup>318</sup>

The Constitutional Court again chose to decide a petition lodged by the prosecutor against Yongyut Tiypairat, an executive member of the PPP, who was accused of vote-buying in the 2007 general election. By virtue of Section 237 of the 2007 Constitution, if an executive member of a political party is found guilty of vote-buying, the political party with which they are affiliated shall be disbanded, and other executive members of that political party shall be banned from any elections for five years. This provision was a part of the attempt by the traditional elites to undermine Thaksin's faction and to declare 'liberal democracy' as a source of the colour-coded crises. Yongyut was found guilty. The PPP was ultimately dissolved, whilst its executive members, including Somchai, were banned from general elections for five years, depriving him of his premiership.<sup>319</sup> The state of emergency was revoked by deputy PM, Chaowarat Charnweerakul, on 9 December.

### ***12.2 The UDD protests against the Yellow government***

According to the Red Shirts, after the dissolution of the PPP, the PAD disbanded, whilst the palace, notably Prem, and the military tacitly persuaded former coalition parties to choose the DP leader—Abhisit Vejjajiva—as PM on 17 December 2008. Between 1992 and 2007, the DP had been defeated in every general election, and had played a major role as the opposition, yet won a majority of seats in the 'Yellow' regions, namely Bangkok and the South. The UDD regarded Abhisit's government as a puppet of the traditional elites and the product of 'a silent coup', and organised sporadic rallies throughout 2009, launching two massive protests against him in 2009 and 2010.<sup>320</sup>

#### ***12.2.1 The 2009 Bloody Songkran incident***

In March 2009, Thaksin made a live video broadcast, accusing the Privy Council President, Prem of engineering the 2006 putsch, and that he and the military were behind Abhisit's rise to premiership. The UDD subsequently launched a protest in April in Bangkok, demanding Abhisit and Prem resign their posts. The protest became more chaotic after the Red Shirts rallied to Pattaya, a special metropolitan area in the eastern region of Chonburi, to disrupt the Fourth East Asia Summit.<sup>321</sup> As the security forces could not stop the Red Shirt protesters,

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<sup>318</sup> Ian MacKinnon, 'Second Bangkok airport shut by Thai anti-government protesters' (*The Guardian*, 27 November 2008) <<https://www.theguardian.com/world/2008/nov/27/thailand>> accessed 12 September 2017.

<sup>319</sup> Constitutional Court Decision no. 20/2551 (2008)

<sup>320</sup> Askew, 'Confrontation', pp 42-43.

<sup>321</sup> Martin Petty, 'Thai protesters target Asia summit' (*Reuters*, 10 April 2009) <<https://www.reuters.com/article/us-asean-summit/thai-protesters-target-asia-summit-idUSTRE5390A020090410>> accessed 10 September 2017.

Abhisit cancelled the Summit, and invoked the 2005 Decree in Pattaya and Chonburi on 11 April. The UDD returned to Bangkok, and started blocking roads, calling Abhisit to dissolve Parliament. The PM then invoked the 2005 Decree in the Bangkok metropolitan areas on 14 April. However, unlike in 2008, using tear gas and live bullets, military officials were deployed to disperse protesters on the Thai New Year's Day or *Songkran day* on April 13.<sup>322</sup> The protest evaporated on 14 April after its leaders voluntarily surrendered themselves to the police.

### ***12.2.2 The 2010 Savage May***

Between September and November 2009, the Red Shirts launched sporadic rallies against Abhisit, causing him cautiously to invoke the ISA in old town Bangkok, intending to prevent violence rather than to dissolve the party as was the case with the 2005 Decree. However, another immense protest, between 12 March and 19 May 2010 in Bangkok, called upon Abhisit swiftly to hold a general election and to reinstate the 1997 Constitution. A failure to reach compromise between the two sides led to prolonged confrontations, violence, a state of emergency and military crackdown.

At the beginning of the protest, Abhisit refrained from invoking the 2005 Decree which would allow the government to disperse the protesters, but only employed the ISA, on 9 March, to control the protest, thus leaving a space for peaceful compromise. On 28 March, he offered talks with the UDD's leaders, hoping for agreement.<sup>323</sup> Yet, on 3 April, after negotiations failed to set an election date, the protesters scattered to occupy the downtown shopping district in Bangkok to put more pressure on Abhisit, who, in response, declared a state of emergency by virtue of the 2005 Decree on 7 April, handing the deputy PM, Suthep Thaugsuban and the military the authority to restore public order. The day after the declaration of the emergency, the UDD television channel was 'blacked out'.<sup>324</sup> An attempt by the military to retake the protest site on 10 April led to more violence after explosions, tear gas and live bullets were used against the protesters, causing the deaths of a journalist, nineteen protesters and five soldiers.<sup>325</sup>

The crisis came to a head between 14 and 19 May. Further clashes, mysterious sniper attacks (presumed to have been undertaken by the military) and skirmishes followed. The

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<sup>322</sup> Nicholas Farrelly, 'Thailand's Songkran crisis of 2009' (*Eastasiaforum*, 13 April 2009) <<http://www.eastasiaforum.org/2009/04/13/thailands-songkran-crisis-of-2009-2/>> accessed 11 September 2017.

<sup>323</sup> 'Thailand PM opens negotiations with Red-Shirts' (*BBC News*, 29 March 2010) <<http://news.bbc.co.uk/2/hi/asia-pacific/8591373.stm>> accessed 11 September 2017.

<sup>324</sup> See Federico Ferrara, *Thailand Unhinged: The Death of Thai-style Democracy* (Equinox 2011), pp 162-163.

<sup>325</sup> 'Thai red-shirt supporter Gen Khattiya shot' (*BBC News*, 13 May 2010) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/8680455.stm>> accessed 10 September 2017.

government and the military decided to end the protest after tanks and troops with live rounds were sent to disperse the protesters at 5.45 am on 19 May, leading to violence fighting, rioting, and more than 30 buildings burned.<sup>326</sup> The operation claimed the lives of civilians, including six in a Buddhist temple, supposed to be a safe heaven, near the Red Shirts' base, whilst an unspecified number of Red Shirt protesters were arrested and imprisoned.<sup>327</sup> Abhisit declared a curfew on the night of 19 May. In total, the crisis between March and May caused more than 90 deaths and over 2,000 people injured, with Abhisit since stigmatised by the Red Shirts as 'an assassin'.<sup>328</sup> Shortly after this incident, the Constitutional Court upheld the constitutionality of Abhisit's invocation of the 2005 Decree, which, in effect, justified the UDD crackdown operation. I will critically analyse the details of this verdict in the next chapter.

In July 2010, Abhisit appointed a Truth and Reconciliation Committee ('TRC') responsible for investigating the 2010 incident, comprising 12 legal and political science scholars, and dissolved Parliament in May 2011. The TRC's roles were limited to finding the truth about the 2010 crackdown and recommending a 'reconciliation strategy' and possible remedies. While finding that the military used live bullets and firearms to disperse the protesters, it simultaneously accused the Red Shirts of producing chaos and possessing lethal weapons.<sup>329</sup> In reality, given the 2014 coup, the report has never been fully implemented. The Supreme Court also dropped murder charges filed by the public prosecutor on the request of the Department of Special Investigation, responsible for investigating national security-related matters against Abhisit and Suthep in August 2017, claiming that it possessed no legal authority to investigate public officials.<sup>330</sup>

### ***12.3 The PDRC protest against the Red government and the 2014 coup***

Despite the above attempts by conservative elites and the military to deal with Thaksin and the Red faction, the DP was nevertheless defeated in a general election on 3 July 2011. Thaksin's younger sister, Yingluck Shinawatra, became the first Thai female PM in August 2011 after the PPP's successor—the Pheu-Thai Party ('PT')—won, with the exception of the DP's base in the South, a general election again by landslide.

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<sup>326</sup> B.J. Terwiel, *Thailand's Political History: From the 13<sup>th</sup> century to recent times* (River Books 2011), pp 310-311.

<sup>327</sup> Michaels K. Connors, 'Thailand's Emergency State: Struggles and Transformation' [2011] *Southeast Asian Affairs* 287, 287-292.

<sup>328</sup> *Ibid.*

<sup>329</sup> รายงานฉบับสมบูรณ์คณะกรรมการอิสระตรวจสอบและค้นหาความจริงเพื่อการปรองดองแห่งชาติ (คอป.) กรกฎาคม ๒๕๕๓–กรกฎาคม ๒๕๕๕ [The complete report of a Truth Reconciliation Committee (TRC) July 2010-July 2012], pp 187-193.

<sup>330</sup> Black case no. 4552/2556 (2013)

After two years of stable politics, in late 2013, the government attempted to pass an Amnesty Bill exculpating all political actors committing during political turmoil since the 2006 coup. The Yellow camp believed that the Bill would effectively immunise Thaksin from corruption charges, while the Red faction and other liberals also blamed the Bill for exculpating Abhisit, Suthep and the military from criminal charges entailed by the dissolution of the UDD protesters in 2010.<sup>331</sup> On 31 October, the PAD, refashioned as the PDRC, led by Suthep who resigned from the DP, organised yet another round of mass protest against the Bill, eventually pressuring Parliament to reject it.

However, the PDRC later transformed itself into the anti-Shinawatra protest, presenting itself as ‘the guardians of *Thai-ness* and the DRMH’ and therefore a group of good men, sparking another political crisis. Suthep proposed the replacement of electoral politics deemed as factional and corrupt with ‘the People’s Council’ consisting of appointed members—100 of whom would be chosen by the PDRC from technocrats and traditional elites considered as *Khon Dee*; the rest would be representatives of various professions—to ‘reform’ the country.<sup>332</sup> Undoubtedly, this goal could be achieved only through suspending the liberal democratic processes, that is, through another coup. The protest was further fuelled by the attempt by MPs of the PT to pass a constitutional amendment bill, replacing the partially-appointed Senate with an entirely elected one just as in 1997. The PDRC branded this bill an endeavour to ‘politicise’ the Senate.

The political crisis forced Yingluck to invoke the ISA between 25 November and 31 December 2013 to control protests and to prevent violence. She also sought to compromise with the PDRC by dissolving Parliament and calling for a general election on 2 February 2014. Yet, the election was condemned by Suthep as an attempt to cleanse Yingluck’s tarnished image, while Yingluck also repeatedly criticised Suthep’s demand for the People’s Council on the ground of its unconstitutionality.<sup>333</sup> The PDRC consequently ran anti-election campaigns; a number of protesters attempted to interrupt the candidate registration process, accusing Yingluck of exploiting the election process simply to legitimise her rule.<sup>334</sup> Protesters also

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<sup>331</sup> Prajak Kongkirati, ‘Thailand’s Failed 2014 Election: The Anti-Election Movement, Violence and Democratic Breakdown’ (2016) 46 JCA 467, pp 473-474.

<sup>332</sup> Mark R. Thompson, ‘Democracy with Asian Characteristics’ (2015) 74 JAS 875, pp 881-882.

<sup>333</sup> See Thomas Fuller, ‘Protesters Disrupt Thai Voting, Forcing Additional Elections’ (*The New York Times*, 2 February 2014) <<https://www.nytimes.com/2014/02/03/world/asia/thailand.html>> accessed 10 September 2017.

<sup>334</sup> See the postscript Prajak Kongkirati, ‘The Rise and Fall of Electoral Violence in Thailand: Changing Rules, Structures and Power Landscapes, 1997–2011’ (2014) 36 CSA 386, p 410.



broke into and closed down several government ministries and offices.<sup>335</sup> The DP withdrew from the election, and brutal violence again erupted due to clashes between ultra-rightist university students and Red Shirt supporters in Bangkok's suburbs, resulting in shooting which led to 4 deaths and 57 people injured on the night of 1 December. Suthep took this opportunity to escalate the protest, declaring it 'the people's coup'.<sup>336</sup>

Due to heightened violence, between 22 January and 22 March 2014, Yingluck later declared a state of emergency under the 2005 Decree around the Bangkok metropolitan area. However, like the events of 2008 but not those of 2010, the new army commander and staunch royalist, Prayuth Chan-ocha, relying on the police, had refrained from assisting the government in dispersing the PDRC, and also from staging a coup between December 2013 and May 2014.<sup>337</sup> Meanwhile, by contrast with 2010, the 'Yellow' television channels were not blacked out by Yingluck and kept broadcasting the protest leaders' speeches. One day before the election, in outer Bangkok, there was street fighting between the Red Shirts, in favour of the election, and the PRDC supporters against it, leading to exchanges of gun fire, severely wounding 4 people.<sup>338</sup>

Again, in the midst of violence and the use of emergency powers, the Constitutional Court intervened in an attempt to steer the direction of the political crisis as follows. Firstly, a military-appointed senator and other DP MPs asked the Constitutional Court to nullify the PT's constitutional amendment bill discussed above. Although the 2007 Constitution required the Public Prosecutor to endorse any petition under Section 68 before it could be heard before the Constitutional Court, the judges bypassed this process and admitted this individual petition. On 20 November 2013, the Court held that the amendment bill, re-establishing the fully-elected Senate, would politicise it, turning it from a non-partisan body into a 'husband-and-wife Parliament' just as in 1997. It then ruled that the bill was tantamount to an endeavour to usurp political power through unconstitutional means prohibited by Section 68 of the 2007 Constitution.<sup>339</sup> This decision outwardly provided a shielding mechanism to protect the sacred space of *Thai-ness*—the appointed Senate—from electoral politics.

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<sup>335</sup> Ibid.

<sup>336</sup> Piyaporn Wongruang and Manop Thip-Osod, 'One killed as 'V-Day' eve violence erupts' (*Bangkok Post*, 1 December 2013) <<https://www.bangkokpost.com/archive/one-killed-as-v-day-eve-violence-erupts/382474>> accessed 26 November 2017.

<sup>337</sup> 'ผบ.ทบ.ยืนยันทหารไม่ปฏิวัติแม้การชุมนุมพรุ่งนี้จะออกมาแบบใด' [The Army Commander denying a coup] (*Infoquest*, 8 December 2013) <<https://www.ryt9.com/s/iq02/1793691>> accessed 26 November 2017.

<sup>338</sup> 'Thai "popcorn" assailant admits being paid by PDRC' (*CNN*, 21 March 2014) <<http://ireport.cnn.com/docs/DOC-1110263>> accessed 26 November 2014.

<sup>339</sup> Decision no.15-18/2556 (2013)

Furthermore, between November 2013 and May 2014, the Constitutional Court, again bypassing the Public Prosecutor's supervisory authority under Section 68 of the 2007 Constitution, continuously ruled against petitions by the UDD leaders and other PT ministers, asking the Court to declare the PDRC protest contrary to the aspiration of liberal democracy, thus flouting this provision.<sup>340</sup> Later in February 2014, fatal clashes between riot police and the masses occurred. The militant guard of the PDRC even exchanged gunfire with them, while several explosives thrown from the protester's site were reported, killing at least four civilians and one police officer and injuring sixty people.<sup>341</sup> Following these incidents, the Civil Court, on 19 February, affirmed the Constitutional Court's ruling by prohibiting the government from applying emergency powers under the 2005 Decree, in particular, to disperse assemblies and to dismantle barricades built by the PDRC.<sup>342</sup>

Besides, due to the PDRC's disruptions, the election process could not be pursued in 69 of 375 constituencies (18.4% of all constituencies). This made the PT unable to form a new government given that under the 2007 Constitution, the House of Representatives cannot convene if the Election Commission does not certify the election of MPs for at least 95% of all constituencies.<sup>343</sup> The DP filed a petition before the Constitutional Court, asking it to void the election. On 21 March, the Constitutional Court declared the election unconstitutional on the ground that voting was not on the same day nationwide.<sup>344</sup>

Given that the invocation of the 2005 Decree could not facilitate Yingluck to organise the general election, and that her emergency authority to disperse protesters was prohibited, the PM had to re-impose the ISA between 19 March and 30 April 2014. However, the situation deteriorated after the Red Shirts reunited in Bangkok in April, re-asserting the anti-coup and anti-PDRC campaigns and condemning the Constitutional Court for striving to create a 'power vacuum' facilitating another coup.<sup>345</sup> Yingluck was later accused by an appointed senator who was also a PDRC member, Phiboon Nititawan, of having abused her power by illegally transferring the national security advisor appointed by Abhisit's government, Thawil Pliensri, and replacing him with a crony. On 7 May, the situation became even more volatile after the Constitutional Court ruled that the move was based on 'patronage', thus constituting an abuse

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<sup>340</sup> Constitutional Court Orders no.58, 59, 61, 63/2556 (2013); 45, 50/2557 (2014)

<sup>341</sup> 'Court Strips Govt Of Various Emergency Powers (*Khaosod English*, 19 February 2014) <<http://www.khaosodenglish.com/politics/2014/02/19/1392808934/>> accessed 10 September 2017.

<sup>342</sup> The Civil Court Black no.257/2557 (2014)

<sup>343</sup> Section 93

<sup>344</sup> Constitutional Court Decision no.5/2557 (2014)

<sup>345</sup> “เสื้อแดง” ชุมนุมถนนอักษะ ถึกคัก [‘The Red Shirts’ convening on Aksa Road] (*Thairath*, 6 April 2014) <<https://www.thairath.co.th/content/414961>> accessed 10 September 2017.

of power, and ordered Yingluck and the other nine ministers to resign.<sup>346</sup> These verdicts created ‘a power vacuum’.<sup>347</sup> Without a permanent government, the army’s commander, Prayuth, intervened by imposing martial law throughout the Kingdom on 20 May.

Avoiding another coup, Prayuth held talks among conflicting interests, namely the PDRC, the DP, the PT and the UDD, claiming as the best possible way to avoid a coup.<sup>348</sup> Nevertheless, failing to find a compromise, another coup was staged on 22 May, abolishing the 2007 Constitution and suspending parliamentary democracy, replacing it with the TSD under the 2014 Interim Constitution with Prayuth asserting the need to halt political romanticism bred by the prolonged colour-coded crises. He later formed a junta—the National Council for Peace and Order (NCPO), and asked from King Bhumibol his blessing.<sup>349</sup> According to Suthep’s recent interview with the BBC, he and Prayuth discussed a coup plot shortly before the imposition of martial law.<sup>350</sup>

Interestingly, Prayuth included Section 44 (‘M-44’), containing a text in the 2014 interim constitution almost identical to M-17 of the 1959 Constitutional Charter, allowing him, in the capacity of the Head of the NCPO, to issue whatsoever orders or act in response to threats especially to national security, unity, harmony and *Nation-Religion-Monarchy*.

Section 44 (M-44) of the 2014 Interim Constitution:

*‘[W]here the Head of the [NCPO] holds an opinion that it is necessary for [safeguarding] public unity ..., or for [preventing] any acts threatening ... national security [or] the throne ..., [he] shall hold an authority to issue any order [for these purposes which] is deemed to be lawful and constitutional ...’* (my translation)

The Interim Constitution also declared all actions related to the coup lawful and constitutional.<sup>351</sup> In August 2014, Prayuth was later chosen by the junta-appointed National Legislative Assembly as the new PM. For a short-period, the 2014 takeover encountered anti-coup protesters, especially the Red Shirts and some progressive students and middle-class, flouting the coup order banning public gatherings of more than 5 people, and leading to arrests and detentions. Though Thailand’s colour-coded political crisis is in still ongoing, we can at

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<sup>346</sup> Constitutional Court Decision no.9/2557 (2014)

<sup>347</sup> Khemthong Tonsakulrungruang, ‘The Constitutional Court of Thailand: From Activism to Arbitrariness’ in Albert HY Chen and Andrew Harding (eds), *Constitutional Courts in Asia: A Comparative Perspective* (CUP 2018), pp 211-212.

<sup>348</sup> “‘ประยุทธ์’ แจงเหตุใช้กฎอัยการศึก” [‘Prayuth’ giving reasons for martial law declaration] (*MatichonOnline*, 20 May 2014) <<http://m.matichon.co.th/readnews.php?newsid=1400577779>> accessed 12 September 2017.

<sup>349</sup> The Royal Proclamation appointing the leader of the National Council for Peace and Order on 26 May 2014

<sup>350</sup> หทัยกาญจน์ ตรีสุวรรณ [Hathaikarn Treesuwan], ‘4 ปี “มีอบนทหวัด” กับ 4 เรื่องหลังฉาก กปปส.’ [‘4 years “Whistles Blowers” and 4 things behind the scene of the PDRC’] (*BBC Thai*, 30 October 2017) <<http://www.bbc.com/thai/thailand-41804763>> accessed 30 October 2017.

<sup>351</sup> Sections 47 and 48

least discern that while the 2014 coup was highly praised by the Yellow faction for helping protect *Thai-ness*, anti-coup movements argue that military intervention in politics is no longer and undisputedly acceptable in 21<sup>st</sup> century Thailand. The more Prayuth endeavoured to establish peace on the surface, especially through harsh measures under M-44 against pro-democracy activists, notably orders summoning certain individuals, filing lèse-majesté criminal charges, arrests and detentions, and other forms of intimidation, the more he had to deal with a cauldron of repressed anger.

### **13. From contestation to collision between the two forces**

The colour-coded crises reveal both conflict over interests and values with a total lack of consensus on whether the liberal or conservative ideal should constitute the hegemonic political ideology/regime (value-judgment ‘*ought*’) and the basis for the use of emergency powers (authority ‘*is*’). Though the latter is still dominant, the former has become more widely acceptable in the modern context. Three main trends can be discerned from such crises and must be considered when applying them to the Kelsen-Schmitt debate.

Firstly, rather than pacifying the PCLD, the reinvocation of a military coup in 2006, in spite of the fact that it claimed to repress public enemies, in fact stirred up such enemies—pro-liberal movements—and galvanised the AoH. In fact, coups and martial law powers tend to strengthen the popularity of those enemies as the Red faction kept winning in every general election since 2007. Its declining hegemony and the growing need to ‘co-opt’ the Red government also force the Yellow faction to think about how to respond to emergency powers invoked by ‘public enemies’ against the mobilisation of anti-liberal ideologies. The crises then mirror not simply a contestation but also a direct ideological and physical collision between the two forces. The Thai case eventually poses a question regarding which of them should provide the basis for legitimisation of political authority, especially of emergency powers imposed to deal with the PCLD. Meanwhile, although the traditional elites and the military prefer subjecting the role of the people to acclamation, they have increasingly realised the importance of mobilising royalist masses to preserve their hegemonic status. The colour-coded crises then suggest the importance of the masses in influencing the application of emergency powers and the problem of the AoH in Thailand associated with them.<sup>352</sup>

Secondly, given the presence of the Red faction and other pro-democracy groups, it was apparent that between 2008 and 2014, the Yellow faction became more politically aware of

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<sup>352</sup> Duncan McCargo, ‘Peopling Thailand’s 2015 Draft Constitution’ (2015) 37 CSEA 329, p 330.

staging another coup, and instead sought to deal with the PCLD through a legal-technical mechanism, namely the Constitutional Court and emergency legislation.

In parallel, and thirdly, this trend significantly challenged the effectiveness of emergency powers. It appeared that such effectiveness did not depend on whether emergency powers were in compliance with legality, but on ‘the colour’. The table below summarises the Constitutional Court’s verdicts which affected the direction of emergency powers in the PCLD between 2008 and 2014.

**Table 3: The Constitutional Court’s verdicts summarised**

<b>Incidents/Decisions by the Court</b>	<b>Government</b>	<b>The Court upholding/paving the way for emergency powers</b>	<b>The Court upholding the hegemony of <i>Thainess</i>/intervening the invocation of emergency powers</b>
<b>The 2008 PAD protest against</b>	Samak Sundaravej and Somchai Wongsawat (Red)	-	- The Cooking Show verdict ending Samak’s declaration of a state of emergency - The PPP dissolution case ending Somchai’s declaration of a state of emergency
<b>The 2010 UDD protest</b>	Abhisit Vejjajiva (Yellow)	- The Court upholding Abhsit’s declaration of the 2005 Decree and the UDD crackdown operation	-
<b>The 2013-2014 PDRC protest</b>	Yingluck Shinawatra (Red)	- ‘Political vacuum’ created by the annulment of the 2014 election case and the Thawil case, paving the way for the 2014 coup and martial law	- The Court confirming the constitutionality of the PDRC rallies, rendering the use of the 2005 Decree to disperse the protesters unconstitutional

According to Tables 2 and 3, the Constitutional Court was ready to intervene in the invocation of the 2005 Decree by the Red governments and other acts deemed to be a challenge what the Yellow faction counts as the norm, and to stigmatise the UDD protest as a threat to national security. Section 13 also indicated the military’s autonomy from civilian oversight as it might resist following commands issued under the 2005 Decree by the PMs of the Red faction or could even choose to stage a coup.<sup>353</sup> By contrast, the Yellow government, with the military’s support, could maintain and even prolong a state of emergency, while the PDRC protesters’ freedom of assembly during the application of the 2005 Decree were preserved by the

<sup>353</sup> Chambers, ‘Military “Shadows”’, p 75.

Constitutional Court. Yet, it was simultaneously apparent that insufficiently harshly repressing the Red faction could not ensure the outward prevalence of its Yellow counterpart. The intervention of the Constitutional Court even paved the way for the silent coup in 2008 and another military coup in 2014. However, the politicisation of the judiciary and the 2014 coup generated, in combination, the feeling of ‘double standards’ among the Red faction, thus precipitating greater social friction.

#### **14. Conclusion**

As I already mentioned, emergency powers in the PCLD in Thailand mirrors the pull of gravity between liberalism and authoritarianism, neither of which absolutely prevails over the other. Meanwhile, the analysis of this process has to take into account actors affiliated with the two factions, namely (a) the Yellow faction which comprises the palace, the traditional elites, the military, the Constitutional Court, and the PAD/PDRC; and (b) the Red faction which is composed of Thaksin Shinawatra and his allies, the UDD, and other pro-democracy/leftist movements.

On the one hand, it is clear that the core of the ‘Yellow’ view on political stability and security has been relatively consistent since before 1932, in that, the royalist elites were prepared to apply the *Dhammaraja* tradition to justify extra-normative emergency powers and the SoE invoked to eliminate any threats to the tradition itself. Since the political struggle in post-1932 Thailand is essentially between two competing conceptions of the source of political authority (*Thai-ness* or the constitution), it is being played out as a raw conflict of political interests and values (both material and symbolic). Emergency powers/martial law are very attractive to the Yellow faction as a way of maintaining their power against the rising challenge of liberal modernisers. The traditional elites, therefore, do not genuinely want such powers to be made legally accountable, because this would weaken their utility for this purpose. To justify this approach, they normally invoke the idea of traditional *Thai-ness* as embodied particularly in the monarchy, thus claiming the need to suppress political instability entailed by political romanticism associated with liberalism to sanction, in particular, banning political gatherings, press censorship and preventive detention of political opponents accused of incitement to violence and sedition. In other words, they claimed the right to invoke emergency powers/martial law, not just to deal with law and order crises, but to defeat any challenge, including peaceful political ones, to the traditional Thai *status quo*, effectively a Schmittian conception.

However, given the trends towards constitutionalism, modernisation, liberalisation and democratisation which stand sharply in contrast with pure military rule, the Thai experience

also suggests that the imposition of coups can no longer simply be placed beyond legal norms. In parallel with this fact, it was also obvious during the colour-coded crises that there were attempts to avoid staging coups and declaring martial law, while the Constitutional Court played a greater role in determining the direction of emergency powers in the PCLD. Besides, the Thai context simultaneously reveals how liberal constitutionalism is increasingly transformed into the contending source of ‘state *authority*’ within the political sphere—a trend which is important for ensuring liberal legality of emergency powers in the PCLD.

Overall, although neither liberalism nor authoritarianism can genuinely prevail as the norm in Thailand, it is at least apparent that there seem to be some attempts to liberalise the use of emergency powers in the PCLD. My findings in this chapter therefore call us to revisit the effects of the hegemonic but declining realist model upon the efforts to put forward a commitment to liberalism, and *vice versa*. The related question is how the conflict between the ‘Red’ and the ‘Yellow’ ideologies affects the characteristics/types of emergency powers invoked in response to the colour-coded crises. This also involves how the roles of the Constitutional Court and the military backed by the traditional elites should be theorised.





## **Chapter 3: Lessons from emergency powers in Thailand's political crises**

### **1. Introduction**

As illustrated in the previous chapter, Thai constitutional history reflects (a) the competing notions of normality and stability between royal hegemony and contending struggles for liberal constitutionalism and democracy, resulting in the PCLD and a series of emergency powers; and (b) the tension between the relentless attempts to re-invoke royalist coups together with martial law and the struggles to ensure compliance of emergency powers with liberal constitutionalism. In this chapter, I aim to address the first research question—*To what extent do the views of the Kelsenian and Schmittian constitutional emergency models apply to the Thai experience?* The answers here provide milestones for synthesising Kelsen and Schmitt in the next chapter. From the *contestation* which eventually leads to the *collision* between the liberal and conservative forces in Thailand, four theoretical questions can be identified.

The first two questions are related to the *internal* perspective of the constitutional emergency model discussed in Chapter 1 as I focus on the assertion of each particular model's political legitimacy against the increasing contestation by opposing political movements. Their answers require us to consider not only the history of the uses of emergency powers in the PCLD both pre- and during the colour-coded crises, but also the development of relevant constitutional provisions drafted in both periods to ensure *Thai-ness* hegemony. To begin with, recurring coups and martial law declarations parallel the efforts to institutionalise *Thai-ness* in the context of rising liberal forces weakening anti-liberal realism itself. Therefore, I primarily ask: *In a society such as Thailand long dominated implicitly, if not expressly, by a Schmittian-type idea, yet experiencing the process of Kelsenian liberalisation, what means would facilitate the former to preserve its political hegemony?* On the flip side, due to emerging liberal demands, the Thai case also exposes the attempt to liberalise emergency powers in light of the dominant politics of exclusion. Here, the question is therefore: *Given the strong authoritarian culture in Thailand, what means would facilitate the efforts to liberalise emergency powers to assert political legitimacy and to be successfully institutionalised?*

On the other hand, the third question is predicated on the key element of the *external* perspective of the constitutional emergency model, that is, the collision between the attempt to maintain a declining coup tradition and the growing importance of a legal-rational legitimacy. This scenario is related to the roles of the Constitutional Court during the PCLD. As Chapter 2 showed, given the declining legitimacy of coups and martial law in Thailand, the Constitutional

Court played a greater role in determining the direction of emergency powers in the PCLD. On the one hand, this reflects the attempt to deal with this matter in a more liberal, legal-rational manner. Nevertheless, given the endeavour to reconnect the judiciary with the *Thai-ness* tradition, the Constitutional Court also played a vital role in either repressing the use of emergency powers by the Red faction or justifying/paving the way for emergency powers against it. Here, I therefore ask how the roles of the Thai Constitutional Court in regard to emergency powers in the PCLD should be understood.

The fourth question also draws upon the *external* perspective but is more concerned with the relation between emergency powers and the AoH. It mainly focuses on emergency powers in Thailand's contemporary political crises, revealing a direct ideological and physical collision between the royalist-conservative Yellow and pro-democracy Red factions which started in 2006. The key question here is: *How does the AoH bred by this collision affect the tension between royal sovereign authority and the attempt to put forward a commitment to liberal constitutionalism during emergencies?*

In Chapter 2, I illustrated the growing connection between the *Thai-ness* tradition and legality. Section 2 of the current chapter seeks elaborates its development and paradox. In Section 3, I intend to assess two ways that facilitate the liberalisation of emergency powers, namely (a) from 'above' with support from the monarchy; and (b) from 'below' through political struggles. Then, in Section 4, the roles of the Thai Constitutional Court during the colour-coded crises and how its verdicts affected the direction of emergency powers applied therewith are considered. Lastly, I assess the substance of emergency powers invoked during the colour-coded crises.

## **2. The 'Yellow' coups and the contrasting processes of liberalisation and democratisation**

This section considers the extent to which the anti-liberal stance of emergency powers has been adapted to defend its political legitimacy against rising liberal forces in Thailand. Various analyses of Thailand's coup culture have been offered by both legal and political scholars. Yet, many of them such as Borwornsak, Khān, or Ukrist are not specifically concerned with the application of emergency powers, and avoid comprehensively assessing the relationship between the traditional elites and the military, and their anti-liberalism.<sup>354</sup> These scholars prefer instead to focus on how factional conflicts within the military, or corruption by politicians, justified coups (Ukrist), on how a communist threat during the Cold War supported

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<sup>354</sup> Borwornsak, *Public law II*; Khān, *Thailand in Crisis*; Ukrist Pathmanand, 'A different coup d'état?' (2008) 38 JCA 124.

authoritarian dictatorship in Thailand (Khīan), or, without assessing the aforesaid relationship, on how to firmly entrench liberal constitutionalism in Thailand (Borwornsak). Besides, there have recently been several brilliant contributions assessing how the Yellow faction-military alliance supports royalist coups, and their effects on Thai democracy, but not *vice versa*.<sup>355</sup> Overall, many contemporary works on Thai public law and politics do not seriously consider how Thai conservatives have ‘adapted’ themselves to the changing circumstances presented by liberal movements. Only by clarifying this question, can we determine how the ‘Schmittian’ model asserts its hegemony in the context of rising liberal legal-rational authority.

At the outset, the Thai experience reveals that the king’s blessing, in the form of a royal proclamation and/or an audience with him after a coup, gave coup-makers legitimacy. Any clear revocation of his support, such as in 1973 and 1992, signified that the use of emergency powers by the military to handle a political crisis was illegitimate. Due to such a role, the royalist-conservatives have normally concluded that the Thai monarch holds sovereign authority to resolve a political crisis.<sup>356</sup> Kobkua and Ramraj even add that the king’s authority in political crises ‘is personal, non-transferable ... [, and therefore] *cannot* be institutionalized.’<sup>357</sup> However, I gain note that we should bear in mind, as Kasien puts it, that royal hegemony in modern Thailand should be regarded as a resolution of the problem of ‘how best to manage the loss of sovereignty to commoner strangers/outsideers so as to preserve the vital interests and values of the palace and the nation.’<sup>358</sup> According to Tom Ginsburg, growing demands for liberal democracy resulting in the 1973 and 1976 incidents at least fostered ‘a constitutional understanding’ among different factions within Thai society that a permanent, authoritarian rule under the guise of the TSD might provoke more popular disquiet which would further tarnish the military’s legitimacy.<sup>359</sup>

As I discussed in Chapter 2, where Sarit sought to ‘kill off’ the 1932 Revolution, post-Sarit coup leaders, though still championing anti-liberal realist ideas, chose to ‘shift from repression to co-optation’, in particular, by ‘further [restructuring] or [broadening] the ruling coalition, and possibly [granting] some of the demands of newly mobilized constituencies’,

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<sup>355</sup> E.g., Pavin Chachavalpongpun, ‘Thaksin, the military and Thailand’s protracted political crisis’ in Marcus Mietzner (ed), *The Political Resurgence of the Military in Southeast Asia* (Routledge 2012); Streckfuss, *Truth*; Thongchai, ‘Toppling Democracy’.

<sup>356</sup> See Borwornsak’s argument in Chapter 2; McCargo, ‘Network monarchy’, p 501.

<sup>357</sup> Kobkua Suwannathat-Pian, *Kings, Country and Constitutions: Thailand’s Political Development 1932-2000* (RoutledgeCurzon 2003), p 67 (emphasis added); Ramraj, ‘EPP’, pp 35, 37.

<sup>358</sup> Kasian Tejapira, ‘The Irony of Democratization and the Decline of Royal Hegemony in Thailand’ (2016) 5 *Southeast Asian Studies* 219, p 226.

<sup>359</sup> Ginsburg, ‘Constitutional afterlife’, p 88.

yet, still preserving the possibility of royalist coups.<sup>360</sup> Accordingly, from the value-judgment ‘*ought*’ dimension, the more authoritarianism has increasingly co-opted liberal democracy, the more, from the cognition/authority ‘*is*’ alternative, this increasingly calls for the institutionalisation/constitutionalisation of ‘coup mechanisms’, namely a coup together with subsequent resort to emergency powers themselves and their future possible uses. My argument here is also distinct from that of Eugénie Mérieau who, despite thinking that this sovereign authority can be institutionalised, considers that its institutionalisation took place only after the commencement of the colour-coded crisis in 2006 through judicialisation of politics, that is, an attempt to *transfer* royal authority to resolve political crises to the Constitutional Court.<sup>361</sup> The term institutionalisation in her article appears to follow the Weberian idea of the routinisation of personalistic authority, in that, it concerns the *replacement* of ‘the rule by men’ with a ‘legal-rational/institutional one’.<sup>362</sup> She nevertheless does not speak of the process of institutionalisation understood, in general, as the establishment of any particular tradition as the norm in a given polity. Given this deficiency, despite recognising the inclusion of constitutional provisions which built the constitutionality of a coup and other emergency actions, Mérieau does not assess them, or more precisely, their ‘evolution’, in tandem with the ongoing process of liberalisation and the seemingly limited authority of the monarchy, thus failing to see them as an attempt to institutionalise/constitutionalise royal emergency authority and *Thai-ness* hegemony in a retroactive manner.<sup>363</sup> Besides, she does not speak of the constitutionalisation of the DRMH in every Thai constitution from the late 1940s as a process for institutionalising a coup and pursuant emergency rule within Thailand’s constitutional and legal landscape. Below, I explain how the legal-rational technique plays several roles in constitutionalising ‘the coup mechanisms’.

I have already illustrated in the previous chapter (Table 1 in Section 8) that Thai political takeovers always resulted in the abolition of an incumbent constitution guaranteeing room for electoral politics and the promulgation of an interim constitution anchoring the TSD, and including provisions largely similar to M-17 of the 1959 Charter (with the exception of the 2006 Interim Constitution), which granted the PM extensive emergency powers to repress threats to *Thai-ness*.<sup>364</sup> Thus, where a coup and the following uses of emergency powers in

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<sup>360</sup> Ferrara, *Political Development*, p 279.

<sup>361</sup> Mérieau, ‘Thailand’s Deep State’.

<sup>362</sup> Weber, *Economy*, pp 246-249

<sup>363</sup> Mérieau, ‘The legal-military alliance’, pp 148-150.

<sup>364</sup> The Constitutional Charters of 1972 (Section 17), 1976 (Section 21), 1977 (Section 27), 1991 (Section 27), and the Interim Constitution of 2014 (Section 44)

Thailand outwardly reveal sovereign authority, there is now a constitutional custom that the military needs to build the constitutionality of the TSD shortly after the period of rule by coup decree.

Nevertheless, according to the constitutional understanding observed by Tom Ginsberg, the changing circumstance after 1973 means that an interim constitution and the TSD are expected to be replaced later by a new permanent constitution, which not only outwardly restores electoral politics, parliamentary democracy and individual rights, but also excludes the ‘M-17’ clause.<sup>365</sup> Notwithstanding the revival of party politics, the drafting of new permanent constitutions, with the only exception of the 1997 Constitution, was normally initiated and influenced by the junta, thus undoubtedly retaining the traditional concept of emergency powers and political stability, including the system of weak parliamentary coalitions, which harboured the possible instigation of coups. In fact, what coup-makers, struggling with greater liberal movements after Sarit’s death, did beyond what Sarit had done previously was nevertheless to include within the 1972, 1976 and 1977 Constitutional Charters an amnesty clause, declaring the *lawfulness* of a coup and relevant action of the junta and others. This reflected the growing need to accommodate what counts as ‘unconstitutional’ to growing liberal demands. For instance, Section 21 of the 1972 Constitutional Charter stipulated that:

*‘Any acts or orders of the coup leader issued or done between the takeover date of 17 November 1971 and the day this Constitutional Charter is promulgated in whatever forms and ... forces ... shall be deemed lawful.’*<sup>366</sup> (my translation)

This clause held the status of a constitutional provision and was therefore not susceptible to a challenge to its constitutionality.

However, after years of experience with (semi-) electoral politics, greater demands for a liberal form of parliamentary democracy forced Prem to step down and organise a general election in 1988. The 1991 coup overthrowing the Chatchai government, though initially popular, had to contend more with liberal demands due to rising political awareness both within and outside Parliament, forcing its leaders to swiftly restore parliamentary democracy by promulgating a democratic constitution in 1991.<sup>367</sup> A more rigorous technique was accordingly required to build the constitutionality of the takeover even after the parliamentary system was restored. The 1991 Constitution then became the first permanent constitution which guaranteed, not just their lawfulness, but also the *constitutionality* of the coup and all related

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<sup>365</sup> The (permanent) Constitutions of the Kingdom of Thailand of 1974, 1978, 1991, 2007, and 2017

<sup>366</sup> The same provisions reappeared in the Constitutional Charter of 1976 (Section 29), 1977 (Section 32) and 1991 (Section 27).

<sup>367</sup> Michael Kelly Connors, *Democracy and National Identity in Thailand* (NIAS Press 2007), p 13.

actions, including all emergency orders issued by the military government under the 1991 Constitutional Charter. Section 222 of which stipulated that:

*‘All declarations and orders of the National Peace Keeping Council ... or other orders issued under Section 27 of the 1991 Constitutional Charter in whatever forces which are still effective until the day this constitution is promulgated shall be deemed effective and **constitutional** under this constitution.’* (my translation)

This provision, in effect, ensures that despite the abolition of an interim constitution imposing the TSD and the restoration of parliamentary democracy, the constitutionality of the takeover cannot be disputed. The 1991 Constitution also confirmed the superiority of the DRMH over alternative political regimes as it was the first Thai constitution which prohibited a motion for a constitutional amendment having the effect of changing the DRMH.<sup>368</sup> However, these provisions could not resist more intense demands for liberal democracy and constitutionalism, in turn, making the building of constitutionality for coup mechanisms more indispensable after the colour-coded crisis of 2006. Accordingly, more concise wordings were employed to insulate the TSD installed after the 2006 coup. Section 309 of the 2007 Constitution, for example, stipulated that:

*‘All actions deemed by [the 2006 Interim Constitution] as **lawful and constitutional**, including actions and activities related to them performed **prior to or subsequent to the date this Constitution is promulgated**, shall be deemed **constitutional** according to this Constitution.’* (my translation)

This provision established a new constitutional practice by granting more extensive protection to coup-makers and their allies against any legal challenges by pro-democracy groups. It built the constitutionality, not merely of actions *prior to* the promulgation of the permanent constitution—notably the coup and other uses of emergency powers—but also, and for the first time, of *future actions* related to the takeover after Parliament was restored, particularly those associated with the enforcement of emergency powers, despite their encroachment on individual rights and liberties provided by the Constitution itself. A Section 309-like provision re-appears in the successor of the 2007 Constitution—the current 2017 Constitution to be considered in the final chapter.<sup>369</sup>

Overall, what is most obvious from the Thai experience is that the imposition of a military coup, given the contesting processes of liberalisation and democratisation, has increasingly been less exceptional in terms of the suspension of normativism. In other words, political stability can no longer be based exclusively on the social order, in particular, the *Thainess* tradition, but has to increasingly conceive the importance of legal stability. This can be

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<sup>368</sup> Section 211(13) of the 1991 Constitution

<sup>369</sup> Section 279

explained in two ways. Firstly, extra-normative emergency powers need increasingly to consider legality as the referent of legitimisation. Secondly, legality is exploited as a means to preserve the possibility of their invocation. Ultimately, Thailand's coup-culture results in a paradox, in that, the growing resort to legality to reserve a space for, to quote Harding, 'what are strictly illegal means itself tends to undermine attempts to establish the rule of law as a binding principle.'<sup>370</sup> Notwithstanding the absence of a strong liberal tradition which leads to the institutionalisation of anti-liberal realism compromising the implementation of the PoA, increasing demands for liberalism within Thai society however mean that this ideal can no longer been totally resisted. In the next section, I turn to means which advance the liberalisation of emergency powers in Thailand.

### **3. The liberalisation of emergency powers against a Schmittian-type alternative**

Despite not constituting a hegemonic political ideal, I showed in Chapter 2 that liberalism, at least, has become an undeniable contending rhetoric in Thailand. This suggests that we should not overlook the importance of examining a political condition facilitating the liberalisation of emergency powers in the context of *Thai-ness* hegemony. The Thai experience of emergency powers in the PCLD offered two possibilities for this process—from the above with the support from the monarchy and from below through the process of political struggles.

#### ***3.1 Proceeding with liberal constitutionalism from the top: Pornsakol on the monarchy***

As obvious from the 1973 and 1992 incidents, the king's decision to revoke his support for the military government, including its use of martial law against protesters, outwardly ended the uprising, and restored electoral democracy and liberal constitutionalism. This fact persuades Pornsakol to conclude the following regarding the role of the monarchy in building liberal constitutionalism in times of crises:

'As the King is the *fundamental* institution of Thailand, it will be *difficult to separate his role from the rule of law application*. ... [H]is involvement in politics [just as in 1973] does *not appear to be negative on the rule of law in Thailand*.'<sup>371</sup>

In other words, Pornsakol concludes that the king might assert his sovereign authority to police emergency powers and re-establish their commitment to a liberal-democratic constitution. Although this argument is right about the role of His Majesty during the 1973 uprising, she fails to assess the conflict between *Thai-ness* as exploited by the Yellow faction

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<sup>370</sup> Harding, 'Emergency powers', p 296.

<sup>371</sup> Pornsakol Panikabutara Coorey, 'Restraining arbitrary power in Thailand: The sociological approach in examining the rule of law' (SJD thesis, UNSW 2010), pp 221-225, 231 (emphasis added).

to justify coups and the attempt to implement liberal democracy and constitutionalism. The colour-coded crises clearly reveal the absence of consensus on what should constitute the hegemonic conception of political stability and authority. In Chapter 4, I will more comprehensively assess this in the light of the Kelsen-Schmitt debate.

Notwithstanding recurring coups and the country's entrenched traditional form of authority, I need to recall observations made by Ginsburg on the constitutional understanding fostered by the 1973 uprising. The emergence of bottom-up demands for liberal democracy, at least, strengthens the contending rhetoric of 'liberal constitutionalism', making it undeniable and inspiring the 1992 Black May turmoil. In contrast to Pornsakol's thesis, it is better to think of the Thai experience as requiring an ongoing struggle for liberal democracy and constitutionalism, regardless of by whom, in order for the PoA to take hold.

### ***3.2 Political struggles for liberal constitutionalism***

I begin this section by recalling the 1973 and 1992 uprisings, and the protests by the Red Shirts and other anti-coup activist groups between 2006 and 2017. For Ramraj and Harding, these incidents highlight the importance of *political struggles* against dictatorship and 'political opinion supporting democratic development, good governance and human rights' among networks of middle-class people, notably civil society organisation, intellectuals, business associations, and opposition activists, who were deprived of a 'democratic voice', in the political arena in transforming the inherent authoritarian culture.<sup>372</sup> They then share the view that successful legal constraints on emergency powers require 'informal backups', notably growing public awareness of authoritarian uses of emergency powers.<sup>373</sup> The term *political struggle* here connotes what Prabhat regards as 'legal mobilisation', that is, a circumstance in which political actors purposely invoke legal norms, raise awareness of the importance of liberalism among the public, and make their moves 'out of doors', including in the form of bargaining/lobbying and mass protests, to realise their demands.<sup>374</sup> Clearly, since 1973, the modern trends towards constitutionalism, liberalisation, and democratisation significantly reinforce the aspiration for liberal democratic constitutionalism, making extra-normative sovereign authority more and more politically outdated.

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<sup>372</sup> Harding, 'Emergency powers', p 312; Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (CUP 2011), pp 44-45; Ramraj, 'Emergency Powers', p 196.

<sup>373</sup> Cf Nomi C. Lazar, *States of Emergency in Liberal Democracies* (CUP 2009), pp 148-159.

<sup>374</sup> Devyani Prabhat, *Unleashing the Force of Law: Legal Mobilization, National Security, and Basic Freedoms* (Palgrave 2016), p 2; Mark Tushnet, 'Popular Constitutionalism As Political Law' (2006) 81 Chi.-Kent. L. Rev. 991, p 994.



A provisional conclusion drawn from this observation is therefore that, for liberal legality to move forward, ‘liberal aspiration’ and a struggle *from below* by pro-democracy movements are essential to transform it into a contending force within the political sphere.<sup>375</sup> Harding and Ramraj then implicitly embrace Moustafa’s conclusion that:

*‘When social forces engage state institutions from the bottom up, they inevitably transform those institutions in ways that were often not initially intended by central decision makers. As a result, authoritarian leaders frequently find themselves locked in conflict with the very institutions that were initially created to advance state interests.’*<sup>376</sup>

While also recognising that political struggles are important, I nevertheless consider these arguments insufficiently comprehensive because they fail to consider the benefit of liberal democratic standards to the Yellow elites and their supporters. To make this case, I need first to explain, through the lens of the Thai experience, the key advantage of liberal constitutionalism as advocated by Kelsen.

The struggle for liberalism in public emergencies, no doubt, contributes towards making such rhetoric a component of political legitimacy against the anti-liberal realist regime in the ‘real-world’ political arena.<sup>377</sup> Clearly, in contrast to Schmitt’s CoP, it prioritises the good of the people, notably their rights and liberties, over that of the state and its officials, thus providing a strong justificatory tool for people subject to those powers to oppose official abuses. In particular, in 1973 and 1992, struggles for liberal democracy and constitutionalism apparently led to ‘the lock’ Moustafa observes. The military government had to pay ‘a heavy price’ for stigmatising the protesters as threats to *Thai-ness* and employing harsh anti-liberal emergency measures to disperse them, notably the use of deadly force, and to force Thanom and Suchinda to resign—the former even having to flee the country. The political cost raised by the struggle clearly forced ‘regime insiders’, to democratise emergency powers to avert further damage to their image. The 1992 Black May incident also galvanised highly vocal demands for political reforms from civil society and even among many royalist-conservative elites aware of the ‘political cost’ of the military crackdown to the level that resulted in the draft of the 1997 Constitution explicitly adopting Kelsen’s PoA.

The beneficial aspect of liberal constitutionalism, however, also appeals to the more enlightened royalist-conservatives, notably where a self-proclaimed democratic government

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<sup>375</sup> Ramraj, ‘EPP’, pp 48-49.

<sup>376</sup> Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (CUP 2007), pp 41-42.

<sup>377</sup> Cf Chen’s observation of emergency powers against student activists in South Korea. See Albert H.Y. Chen, ‘Emergency powers, constitutionalism and legal transplants: the East Asian experience’ in Ramraj and Thiruvengadam (eds), *Emergency Powers in Asia*, p 78.

gains power and uses emergency powers to repress its enemies. For example, the application of emergency powers by *the People's Party* to repress the royalist-conservatives in the 1930s, justified by liberal constitutionalism, indicates that in a society experiencing the PCLD, but one lacking a firm liberal tradition of constitutionalism, even those purporting to advocate liberal democracy might not genuinely commit to its core ideal when wielding emergency powers in political crises themselves. Harsh emergency measures authorised by the 1933 Act—such as preventive detention and deportation—enacted by *the People's Party* to repress the monarchy subsequently created an opportunity for the traditional elites legitimately to reproach such conduct for betraying the liberal spirit of constitutional democracy.<sup>378</sup> King Prajadhipok eventually abdicated in March 1935, reprimanding *the People's Party's* autocratic government. As a result, a heavy cost was incurred by the latter in justifying the liberal constitutionalism they purportedly championed. Given their failure, the royalist-conservative elites and the PAD/PDRC normally cite the king's abdication speech, considered to be a condemnation of such repression, to label *the People's Party* 'usurpers of political power' and 'fake democrats'.

Likewise, the PAD and the PDRC were prepared to struggle for liberal legality when emergency powers were invoked by the 'Red' governments against them. The former groups, vowing to exercise their constitutional freedom of expression and political assembly, were ready to claim a failed commitment to liberal constitutionalism to undermine the latter's political legitimacy and to mobilise masses. The PDRC protesters also benefited from the Constitutional Court's orders declaring their protest a constitutional exercise of the freedom of expression and assembly, thus preventing the government from resorting to emergency powers to disperse them.

Meanwhile, the above facts also remind that not all self-proclaimed liberals in Thailand genuinely commit themselves to 'liberal values'—this is also true in the case of some members of the UDD. It would be misleading to accuse Abhisit's government and the military alone for causing the atrocity in 2010 as hardcore leaders of the Red Shirts such as Arisman Pongruangrong and Nattawut Saikua outwardly provoked their supporters to sow chaos, including by committing arson.<sup>379</sup> Ironically, the latter group still claimed the protection of liberal democracy and constitutionalism to justify their violent actions and to discredit the state of emergency declared by Abhisit. Yet, as I showed in the previous chapter, the greater the Yellow government and the military vehemently disregarded liberal-democratic standards

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<sup>378</sup> Ferrara, *Political Development*, p 99.

<sup>379</sup> Nick Nostitz, 'The Red Shirts: From Anti-Coup protesters to Social Mass Movement' in Pavin (ed), *"Good Coup"*, p 185.

when resorting to harsh emergency powers under the 2005 Decree during the crackdown operation, the greater they lost their legitimacy and have entrenched social polarisation.

Having discussed the political struggle for legality by liberals, Harding and Ramraj fail to recognise the liberalisation of emergency powers as a matter of self-interest without an intrinsic commitment to liberal value. Demands for putting Thai political authority, including emergency powers, under ‘liberal-legal constraint’ by all factions in Thailand share one common element, i.e., they result from ‘self-preservation’ which propels the rhetoric of constitutionalism into a contending force within the political sphere. More importantly, having limited a political struggle for legality in political crises to liberals, their arguments fail adequately to understand the general benefit of liberal constitutionalism—the priority of rights over good, thus adopting the Weberian straight-line which conflates ‘interest’ for liberalism (*‘is’*) with ‘liberal value’ (*‘ought’*).

In sum, the Thai context emphasises the need rigorously to separate conflicting views on ‘emergency authority’ from those on ‘value-judgment’ regarding what counts as ‘the source of the PCLD’. The Thai experience here gives a hint that: (a) the absence of an entrenched liberal-democratic culture makes liberal constitutionalism more prone to violation by both the civilian and military-backed government and the military; (b) supporting liberal legality is not advantageous merely to pro-democracy liberals; and (c) the right-wing conservatives might also ‘demand’ the use of emergency powers to commit to democratic constitutionality, notably when their *political interest* is threatened and they lose their firm grip power.

In the next section, I turn to the roles of the Thai Constitutional Court during the colour-coded crises, considered in the separate section mainly because they reveal the conflict between the challenge posed by rising liberal forces and the attempt to maintain royal hegemony against them examined in Section 2. Such roles also reflect how the Yellow faction responded to emergency powers imposed by ‘public enemies’ against the mobilisation of anti-liberal ideologies.

#### **4. The Constitutional Court and emergency powers in the PCLD**

Contemporary Thailand has struggled with two competing conceptions of constitutional review in national security matters. Given that the adoption of Western-style judicial procedures was initiated by King Chulalongkorn as a part of the Chakri Reformation, the royalist-conservative elites traditionally conceive the judiciary as the king’s servant and therefore the guardian of *Thai-ness*—a state of affairs which Pridi intended to replace after the 1932 Revolution with the idea that judges hold a rigorous commitment to liberal-democratic

principles, but failed to achieve.<sup>380</sup> The enactment of the 1997 Constitution significantly reinstated Pridi's aspiration, yet, was again met with veto by traditional elites, using the 2007 Constitution to re-emphasise judges' loyalty to *Thai-ness*. Through the lens of the Constitutional Court's verdicts between 2008 and 2014, I explore below how, and the extent to which, the clash between the two conceptions of constitutional review affects the direction of emergency powers in the PCLD. The findings here are important for reconsidering the application of Kelsen's PoA in the context of royal hegemony and Schmitt's original view on constitutional guardianship.

#### ***4.1 Constitutional review of emergency powers in Thai political history***

To understand contemporary constitutional review of emergency powers, Pridi's view of the role of the judiciary must first be examined. Ostensibly, the wording of the 1946 Constitution drafted by Pridi reflected his efforts to separate the judicial system, especially from the monarchy, by preserving an independent system of judicial recruitment and discipline.<sup>381</sup> Furthermore, Pridi was the very first Thai politician to introduce the concept of constitutional review into the Thai constitutional system. In 1946, due to considerable suspicion among the royalist-conservatives that the new system of constitutional review would usurp their power to interpret law, he chose not to establish a permanent constitutional court. Instead, he set up an *ad hoc* Constitutional Tribunal based on the French Conseil Constitutionnel, comprising a legal expert who acted as its president with fourteen other judges, responsible for policing unconstitutional laws, including emergency decrees.<sup>382</sup> Yet, for the traditional elites, this innovation was a symbolic challenge, in particular, to 'their *right to interpret the law and alter constitutional rules*' through extra-normative means.<sup>383</sup> Owing to a strong royalist tradition, Pridi failed to execute his intentions in practice; yet, his Constitutional Tribunal is nevertheless a key milestone for the establishment of Kelsenian constitutional review.

The 1947 coup backed by the traditional elites, ousting Pridi and his allies, marked the beginning of the restoration of the traditional form of *Thai-ness* in Thailand by seeking explicitly in the written constitution to connect the courts with the monarchy by conferring upon the king a prerogative to appoint and remove judges.<sup>384</sup> Since 1973, judges have had a

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<sup>380</sup> Duncan McCargo, 'Readings on Thai Justice: A Review Essay' (2015) 39 ASR 23, p 32.

<sup>381</sup> Section 80 of the 1946 Constitution

<sup>382</sup> Section 89 of the 1946 Constitution

<sup>383</sup> Dressel, 'Thailand: judicialization', p 82; see Fred W. Riggs, *Thailand: The Modernization of a Bureaucratic Polity* (East-West Center Press 1966).

<sup>384</sup> See Part 8 of the 1949 Constitution

constitutional duty to pledge their loyalty to the *sacred trinity* and to swear faithfully to perform their duties in the name of His Majesty.<sup>385</sup> The consequence of this monarchist turn is clearly that the sole political position, to which judges, from 1947 onwards, must commit themselves, is the DRMH, and that their role is to protect such a regime from any challenge.<sup>386</sup> The gradual restoration of royalist politics therefore took the form of a new alliance between the judiciary, royalist elites and the military, paralleled by the court's role in bestowing legal-rational legitimacy upon coups.<sup>387</sup> However, given the traditional elites' negative attitude towards the Constitutional Tribunal, before 1997, it was the Supreme Court that was entrusted with such a role, rigorously re-embraced by the contemporary Constitutional Court, particularly from 2007 onwards.

In the Supreme Court decision no. 45/2496 (1955), the first time the Thai judiciary was asked to decide whether the first royalist takeover in 1947 was valid, the judges asserted that:

*'Given that the junta had successfully seized state power in 1947, it then holds the authority to administer the country ... The 1947 Constitution [promulgated after the successful coup] was then a valid law.'* (my translation)

As Harding observes, the first sentence of this decision followed Kelsen's approach that a successfully committed coup begets the validity and effectiveness of a legal order established afterwards to justify it.<sup>388</sup> However, Harding's observation needs further explanation. The 1947 coup was 'a ruling class conspiracy' to revive the *Thai-ness* establishment and the first coup directed against electoral politics. By accepting the reason propounded by the junta that the coup was necessary to restore peace and public order out of a volatile political situation, the court exploited Kelsen's legalisitic approach to institutionalise royal 'Schmittian' hegemony.

Importantly, the verdict left a lasting precedent, namely the superiority of the DRMH over liberal democracy, after implicitly praising the former for helping restore political stability and accusing the latter of precipitating political romanticism and instability. Later decisions concerning the validity of a coup and related actions, including the implementation of the TSD and the validity of M-17, followed this decision, despite having been decided after parliamentary democracy was restored.<sup>389</sup> However, the 1992 uprising, together with the trends

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<sup>385</sup> The Constitutions of Thailand 1974 (Section 207); 1978 (Section 175); 1991 (Section 192); 1997 (Section 252); 2007 (Section 201); 2017 (Section 191)

<sup>386</sup> McCargo, 'Readings', p 33.

<sup>387</sup> Mérieau, 'The legal-military alliance', pp 143-145.

<sup>388</sup> Andrew Harding, 'The Eclipse of the Astrologers: King Mongkut, his Successors, and the Reformation of Law in Thailand' in Penelope (Pip) Nicholson and Sarah Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinus Nijhoff 2008), p 332.

<sup>389</sup> See the Thai Supreme Court decisions no. 1512-1515/2497 (1956); no. 1662/2505 (1962); no. 1243/2523 (1980). The same logic was also rendered to justify M-17 (Decision no.494/2510 (1967)).

of liberalisation and democratisation, significantly damaged the military's image, and resulted in public demand for constitutional reform, leading to the establishment of the full-time Constitutional Court based on Kelsen's model. This proved irresistible, even though the traditional elites saw the Constitutional Court as threatening the *Thai-ness* establishment.

#### ***4.2 The 1997 and 2007 Constitutions compared***

The 1997 Constitutional Court was composed of five Supreme Court judges, two Administrative Court judges, five legal experts and three political scientists.<sup>390</sup> Names of sixteen experts were initially picked by a committee of political party representatives, judges and university deans.<sup>391</sup> But only eight were ultimately chosen by the fully and directly Senate with 200 members.<sup>392</sup> Following Kelsen's theory, this was intended to keep party politics out of adjudication, while trying to balance law with politics, and theory with practice. Procedure was inquisitorial and the decisions of the Constitutional Court were binding to all political organs.<sup>393</sup> Above all, it was entrusted with protecting liberal constitutionalism and putting an end to *constitutional saṃsāra*.<sup>394</sup> It held the authority to determine whether a statute, including an emergency decree, contravened fundamental liberal-democratic principles,<sup>395</sup> and under Section 63 of the 1997 Constitution, it could prevent future coups since anyone knowing of a coup plot could lodge a petition before the Public Prosecutor requesting a cessation order. However, this provision remained dormant for a decade until the birth of the colour-coded crises and the promulgation of the 2007 Constitution, Section 68 of which contained in wording almost identical to Section 63 provided

*'No one shall exercise their rights ... to overthrow [the DRMH] or to acquire political power by means [unauthorised] by this Constitution.*

*Provided an individual or a political party commits the [above] act, anyone knowing of [it can] request the Public Prosecutor to inspect and lodge a petition to the Constitutional Court for a cessation order...'*

It was actively applied especially between 2013 and 2014 during the mass protests, significantly affecting the use of emergency powers in the PCLD.

Here, it is important to recall the different conceptions of what counts as 'the norm' and 'the exception' under the 1997 and 2007 Constitutions. With respect to the conception of 'the norm', the 1997 Constitution clearly sought to preserve royal hegemony. Despite exhibiting

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<sup>390</sup> Section 255 of the 1997 Constitution

<sup>391</sup> Section 257 (1)

<sup>392</sup> Section 257 (2)

<sup>393</sup> Andrew Harding and Peter Leyland, 'The Constitutional Courts of Thailand and Indonesia: Two Case Studies From South East Asia' (2008) 3 JCL 118, p 119.

<sup>394</sup> Ibid, p 120.

<sup>395</sup> Sections 219 and 264

scepticism about party politics, it simultaneously aimed to entrench a firm commitment to liberal-democratic values and constitutionalism. In reality, this aim was however undermined by the rise of Thaksin Shinawatra, and reflected the paradox of the role of the Constitutional Court as ‘democratic consolidator’. Shortly after Thaksin had won a landslide election victory in 2001, he was found by the National Anti-Corruption Commission (‘NACC’) to have deliberately concealed most of his assets and therefore submitted a false asset report. He registered most of his fortune in names of his security guard, driver, and housekeeper. According to the NACC, this misconduct constituted a manifest breach of the 1997 Constitution aimed eliminating conflicts of interests.<sup>396</sup> Nevertheless, according to the Constitution, it was for the Constitutional Court to affirm the decision of the NACC—a confirmation would have resulted in an impeachment of Thaksin, banning him from politics for 5 years.<sup>397</sup> Despite the newly elected PM’s manifest dishonesty, the Constitutional Court, in the Decision no. 20/2544 (2001) on 3 August 2001, narrowly ruled in his favour, absurdly reasoning that ‘the failure to declare [his] assets was no more than an honest mistake.’<sup>398</sup> Clearly, this decision to allow Thaksin to reserve his premiership was largely fueled by the political climate at the time. Given a post-Black May enormous public appetite for popular democracy and constitutional reform, Thaksin’s disqualification, to quote Harding and Leyland, ‘would have in effect invalidated the result of the election with the prospect of political turmoil’.<sup>399</sup> However, if considered this decision from a positive point of view, it reflects how the Thai Constitutional Court potentially plays what Ginsburg calls ‘the role of democratic consolidator [by] allowing a popular leader to take power’ and tacitly negating another military coup.<sup>400</sup> Paradoxically, this role did not ensure that what Kelsen preferred as the norm prevailed over its Schmittian alternative. On the one hand, the above decision reflects how the doctrine of legal imputation—the function of law in bestowing legality upon state power—is undermined for the sake of political expediency. At the same time, the rise of Thaksin, as I discussed in Chapter 2, also facilitated the entrenchment of the Schmittian-like constitutional tradition. Given the supposedly neutral Senate under the 1997 Constitution, playing a key role in selecting judges, was, in practice, captured and politicised by Thaksin,

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<sup>396</sup> Sections 291-293

<sup>397</sup> Sections 295

<sup>398</sup> Harding and Leyland, ‘The Constitutional Courts’, p 131.

<sup>399</sup> Ibid, p 132.

<sup>400</sup> Tom Ginsburg, ‘The politics of Court in Democratization: Four Junctures in Asia’ in Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (CUP 2013), p 60.

the PoA was, in effect, compromised.<sup>401</sup> The 2007 Constitution, by contrast, sought greatly to limit the space for electoral politics. Therefore, where the 1997 Constitution formally counted a military coup and subsequent uses of emergency powers as the exception, the Red Shirts, Red politicians, and an excessive demand for liberal democracy were tacitly regarded under the 2007 Constitution as threats to *Thai-ness*. This difference is significantly related to the composition of the Constitutional Court under the latter.

The 2007 Constitutional Court comprised nine judges, three Supreme Court judges, two Supreme Administrative Court judges, two legal experts, and two political scientists. A selection committee, comprising the President of the Supreme Court, the President of the Supreme Administrative Court, the President of the House of Representatives, the Leader of the Opposition in the House of Representatives, and the President of an independent agency created under the Constitution, functioned to propose names of candidates for Constitutional Court judges to the Senate to approve.<sup>402</sup> Under the 2007 Constitution, the Court was granted the new power to dissolve any political party, if one of its executive members commits election fraud, and to ban its executive members from any elections for five years.<sup>403</sup> Resting on the *Thai-ness* tradition that liberal parliamentary politics is extremely corrupt, it further held the power to dismiss politicians, notably MPs and members of the cabinet, if found abusing their power or having conflicting interests.<sup>404</sup> Put simply, contrary to the role of the guardian of liberal constitutionalism, the 2007 Constitution re-emphasised the oath of allegiance the Constitutional Court judges swore to the king and their traditional role as the guardian of *Thai-ness*.<sup>405</sup>

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<sup>401</sup> A recent research by Dressel and Khemthong also shows that under the Thaksin administration, judges nominated by the government and having experience in the executive inclined to vote in favour of Thaksin's policies. Björn Dressel and Khemthong Tonsakulrungruang, 'Coloured Judgements? The Work of the Thai Constitutional Court, 1998–2016' [2018] JCA 1, p 11.

<sup>402</sup> Sections 206

<sup>403</sup> Sections 204 and 237

<sup>404</sup> Sections 102 and 182

<sup>405</sup> See Jarun Pukditanakul's interview in หทัยกาญจน์ ตรัสสุวรรณ [Hathaikarn Treesuwan], 'ในหลวง ร.9 : “ตุลาการหมายเลข 1” กับ “แสง” แห่ง วิฤต รชน. 2549' ['King Rama IX: 'the no.1 judge' and 'the light' shining amid the constitutional crisis in 2006'] (*BBC News*, 8 October 2017) <[http://www.bbc.com/thai/thailand-41521691?ocid=socialflow\\_facebook](http://www.bbc.com/thai/thailand-41521691?ocid=socialflow_facebook)> accessed 9 October 2017.



Since then, the judges have become more involved in politics, and largely voted in favour of the royalist Yellow faction, in particular, when emergency powers were imposed. This was reinforced by the fact that some of the Constitutional Court judges were handpicked by the anti-Thaksin military-backed Senate. Two judges, Jarun Pukditanakul and Supot Kaimook, were key drafters of the 2007 Constitution and outspoken critics of ‘the Thaksin regime’.<sup>406</sup> Its former president, Wasan Soipisut, as I will show below, even publicly admitted that the Constitutional Court’s decisions are partisan, and even once publicly expressed his conservative sympathies by labelling Yingluck *ammat* (evil aristocrat) in a press conference.<sup>407</sup> Another judge, Taweekiat Meenakanit, a former law professor who replaced Wasan in August 2013, had praised the 2006 coup for purging Thaksin, and another judge, Nurak Marpraneet, previously advocated the dissolution of the TRT.<sup>408</sup>

#### ***4.3 The Constitutional Court and emergency powers in the colour-coded crises***

The Thai Constitutional Court is notorious among scholars for its partisan interventions. Recently, several scholars label its verdicts between 2008 and 2014 as part of the political attempts by the Yellow faction to repress the Red counterpart. As McCargo, Mérieau and Piyabutr observe, due to the politicisation of the Constitutional Court, it is not beyond possibility that its verdicts were partisan, and ‘made on the basis of political opportunity rather than legality’.<sup>409</sup>

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<sup>406</sup> Dressel, ‘Thailand: judicialization’, p 92.

<sup>407</sup> For the press conference: <https://www.youtube.com/watch?v=hU81LlzNmho> (in Thai)

<sup>408</sup> Dressel and Khemthong, ‘Coloured Judgements?’, pp 11-12.

<sup>409</sup> Duncan McCargo, ‘Competing Notions of Judicialization in Thailand’ (2014) 36 CSEA 417, p 430; Mérieau, ‘Thailand’s Deep State’, p 461; ปิยนุตร แสงนกกุล [Piyabutr Saengkanokkul], *ศาลรัฐประหาร [Judicial Coup]* (Sameskybooks 2017), p 16.

Dressel and Mietzner also criticise these verdicts for severely compromising both the judges' commitment to the rule of law and 'the professionalism of [an] institution like the Constitutional Court'.<sup>410</sup> Nevertheless, this PhD thesis goes beyond these contemporary works by assessing how the aforesaid politicisation affected the application of emergency powers in the colour-coded crises. Here, I avoid the term 'constitutional review of emergency powers in the PCLD' as most of the Constitutional Court's judgments between 2008 and 2014 are not directly concerned with the constitutionality of emergency powers *per se*, yet, still affected their application and the landscape of the norm-exception dichotomy in Thailand.

At the outset, it is problematic to derive legal principles from their verdicts due to their partisan nature. But, by critically examining these judgements in light of Kelsenian and Schmittian ideas, I go beyond contemporary comments on the Constitutional Court's roles during the colour-coded crises by dividing its verdicts into two groups. The first favours state-ism and national security, while the second concerns those prioritising the respect-to-rights and democratic principles. These two alternatives also exhibit however the contrasting relationship between 'law' and 'fact'. Table 4 below summarises the Constitutional Court's decisions related to the application of emergency powers in the colour-coded crises.

**Table 4: The Constitutional Court's cases during the colour-coded crises**

<b>Incidents during which the cases were decided/names of the cases</b>	<b>Cases against the Red faction</b>	<b>Cases against the Yellow faction</b>
1. The PAD protest in 2008	<ul style="list-style-type: none"> <li>- The cooking show case (Decision no. 12-13/2551 (2008))</li> <li>- The dissolution of the PPP case (Decision no. 20/2551 (2008)) ['state privileging' approach]</li> </ul>	
2. The UDD protest in 2010		<ul style="list-style-type: none"> <li>- The constitutionality of Abhisit's declaration of the 2005 Decree in 2010 (Decision no. 10-11/2553)</li> </ul>

<sup>410</sup> Björn Dressel and Marcus Mietzner, 'A Tale of Two Courts: The Judicialization of Electoral Politics in Asia' 25 *Governance* 391, p 400.

		(2010)) ['state privileging' approach]
3. The PDRC protest between 2013 and 2014	-The constitutional amendment bill case (Decision no. 15-18/2556 (2013)) -The annulment of the 2014 election case (Decision no.5/2557 (2014)) -The Thawil case (Decision no.9/2557 (2014)) ['state privileging' approach]	-The constitutionality of the PDRC protest (Constitutional Court Orders no. 58, 59, 61, 63/2556 (2013); 45, 50/2557 (2014)) ['rights and democracy privileging' approach]

#### ***4.3.1 The 'state privileging' approach: extreme factuality***

This approach prioritises the use of emergency powers to ensure national security over the protection of individual rights and even at the expense of the spirit of liberal democracy. It involves labelling the Red faction and electoral politics associated with liberal democracy as threats to national security. Here, three types of Constitutional Court decisions can be distinguished.

##### ***4.3.1.1 The constitutionality of the UDD crackdown***

The first type of verdict is most directly related to the substance of emergency powers in the PCLD. In 2010, the Constitutional Court played a role in deciding on the legality of the UDD protest but was more cautious than in 2008 as it did not directly intervene to halt a clash between the government and the protesters. By virtue of the 2005 Decree, many UDD leaders were detained and brought before the Criminal Court. Under the 2007 Constitution, parties to the case proceeded in any court of law were allowed to raise an objection that a provision of an emergency decree contravened the spirit of the Constitution.<sup>411</sup>

In Decision Nos.10-11/2553 (2010), two of the UDD leaders asked the Constitutional Court to declare Abhisit's declaration of the state of emergency unconstitutional given that the protest was an exercise of freedom of expression. However, the Constitutional Court judges quickly dismissed the case by ruling that emergency powers under the 2005 Decree were necessary for protecting public interest, preventing violence, and suppressing exigencies. This decision, in effect, declared the UDD protest unconstitutional, and the

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<sup>411</sup> Section 211.

military's 19 May operation legal.<sup>412</sup> In contrast to the above decision, the second and third types of verdict adopting the 'state privileging' approach are not directly concerned with the constitutionality of emergency powers. Nevertheless, they significantly affect the application of these powers during the mass protests.

#### *4.3.1.2 The superiority of the rightist-realist view on emergencies*

The second type of verdict is related to the competing interpretations of what constitutes 'acts violating the DRMH' under Section 68 of the 2007 Constitution. It simultaneously challenges what constitutes the norm and the exception in a society like Thailand convulsed by the PCLD.

Ostensibly, both the Red and Yellow factions branded governments led by their opponents either 'Thaksin's nominee' or 'the traditional elites' puppet'. They also justified their struggle by claiming the right to protect the constitution against those in power. Clearly, both factions interpreted Section 68 differently. The Red Shirts and other liberals largely based their version on the anti-coup spirit of the 1997 Constitution, while the Yellow faction adopted a more conservative interpretation, regarding 'acts violating the DRMH' as threats to *Thainess*. The Constitutional Court embraced the second of these, thus playing a major role during the PDRC protest in guaranteeing the supremacy of the 'Schmittian' view of emergencies and political crises over its 'Kelsenian' liberal democratic alternative.

Decision no. 15-18/2556 (2013), annulling the constitutional amendment bill—which sought to replace the partially-appointed Senate with the fully-elected one—significantly affects the definition of emergencies and political crises. By declaring such an attempt 'an act seeking to acquire political power through undemocratic means', the judges, in effect, implicitly reaffirmed the precedent set by the Supreme Court in 1947 that liberal democracy and electoral politics are the sources of political instability, and therefore of the PCLD and emergencies, and that the dominance of royalist politics constitutes the state of normalcy. This decision indirectly helped preserve the coup culture in Thailand's constitutional order, and also bolstered the legitimacy of the PDRC protest against Yingluck.

#### *4.3.1.3 The Constitutional Court and a power vacuum*

Lastly, the third type of verdict reflects how the Constitutional Court helped institutionalise 'a power vacuum' within the legal order, enabling the politics of decisionism to reassert itself. The decisions ousting Samak and Somchai in 2008, voiding the 2014 general election, and the Thawil case fit this category. Despite not being directly concerned with the

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<sup>412</sup> Mérieau, 'Thailand's Deep State', p 459.

substance of emergency powers, these judgments were implicitly premised on the *Thai-ness* tradition, and significantly affected the imposition of such powers against the PAD/PDRC, even paving the way for the military takeover and the imposition of martial law in 2014.

The Constitutional Court's decisions ousting Samak and Somchai together with the dissolution of the PPP were apparently rendered when the 2005 Decree was invoked against the PAD protesters, resulting in the abolition of emergency powers, and even the restoration of public order. The motivation behind these verdicts was later inadvertently disclosed by the then-President of the Constitutional Court, Wasan, who publicly said that:

*'[If] the government ... could have joined hands [with the opposition], the country could have moved forward, and I believe most of the judges would have decided not to dissolve the parties ... But, the country at that time was **chaotic** and the Constitutional Court had to use its judgement to maintain **law and order**.'*<sup>413</sup>

From Wasan's explanation, it appears that the logic of the SoE *qua* an extreme emergency constitutes the rationale behind these two verdicts rendered during a highly volatile political situation. However, rather than regarding emergency powers as necessary mechanisms for resolving the PCLD as in the first type of verdict, the power vacuum in 2008 was implicitly based on the assumption that such powers which led to the restriction of rights and liberties of the Yellow Shirts were problems rather than means to solve political instability. Accordingly, their invocation needed to be halted, through what the Red Shirts regard as the 'silent coup', to restore public order.

Contrary to the aforesaid judgement whereby the power vacuum was based on the need 'to maintain law and order' to halt emergency powers wielded by 'public enemies', the vacuum engineered by the annulment of the 2014 election and the Thawil verdicts facilitated the application of emergency powers to fill the vacuum itself. The 2014 election was annulled as a response to the PDRC's attempts to block the election process, precipitating an emergency declaration. Rather than accusing the protesters, the Constitutional Court judges blamed the Red government for 'its miscalculation' by choosing to organise the general election during a period in which the country had been confronted with, in their words, 'severe political conflicts and internal disunity among the people'.<sup>414</sup> According to the Court, it was for the government 'to bear all the costs of holding a peaceful election without recognizing the fault of other parties'.<sup>415</sup> Accordingly, it was the general election, rather than the PDRC's

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<sup>413</sup> 'Charter court chief focuses on balance' (*The Nation*, 16 march 2013) <<http://www.nationmultimedia.com/politics/Charter-court-chief-focuses-on-balance-30202064.html>> accessed 4 October 2017 (emphasis added).

<sup>414</sup> Decision no. 5/2557, p 17.

<sup>415</sup> Constitutional Court of Thailand', p 211.

attempts to block the election processes, which precipitated an emergency situation, thus justifying its annulment. Also, in the Thawil case, the Constitutional Court ordered Yingluck, who was then interim PM, to step down immediately on the date the verdict was rendered, without waiting for the new government to be sworn in. Together, these two cases hindered the formation of the new government, and eventually produced a ‘power vacuum’. With no PM or permanent government, the vacuum precipitated another coup and the imposition of martial law in May 2014.

#### 4.3.1.4 Analysis

As we can see, the primary logics underlying the above cases decided by the Constitutional Court is the notion of ‘public order’. Yet, these decisions clearly manifest a number of flaws which can be identified as follows. To begin with, in Decision Nos.10-11/2553 (2010), the judges merely asserted the fact that the emergency powers under the 2005 Decree are necessary to preserve national security. However, they dismissed the case without considering the legal question of whether the constitutional freedom of expression claimed by the arrested UDD activists had been exercised. Nor, did they apply the principle of proportionality to the use of emergency powers in practice by asking whether the latter were applied in compliance with the objective of law, and in such a way that was capable of resolving public emergency without causing excessively onerous effect on individuals. In doing so, the Thai Constitutional Court concedes the Schmittian position that normativism plays no role in constraining emergency powers. This decision needs to be compared with the Court’s orders concerning the constitutionality of the PDRC protest which I will turn to later.

Moving onto the constitutional amendment bill case, the judges explicitly contravened the wording of the 2007 Constitution by declaring the case admissible without a petition from the Public Prosecutor. Also, their decision is based on right-wing constitutional logic, notably its deep distrust of electoral politics. However, it is problematic because the judges merely *presumed* the *possibility* of ‘husband-and-wife Parliament’ entailed by the bill.

With respect to the ‘Cooking Show’ and ‘the PPP dissolution’ cases, it was obvious that by endorsing the logic of the SoE, the judges did not use ‘law’ to decide this case at all. In the former case, they failed to determine how hosting a cooking show constitutes conflict of interest that threatens the unity under *Thai-ness*.<sup>416</sup> Also, the verdict is blatantly absurd and unprofessional since the judges used a normal dictionary, rather than the Labour Protection Act 1998, to construe the word ‘employee’ enshrined in the 2007 Constitution and

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<sup>416</sup> McCargo, ‘Competing Notions’, p 430.

declared Samak's act unconstitutional. It is controversial to regard the dictionary as an authoritative source of law because according to the Labour Protection Act 1998, Samak was not really an employee given that he did not receive any salary from a television company and had the freedom to design his own shows.<sup>417</sup> Likewise, in the verdict of the PPP dissolution case, which contains less than three pages and is extremely flawed, the judges' decision was explicitly based on the testimony of one witness who claimed to have received 'the money' from Yongyut without regard to the PPP's claim that this person had been involved with the DP and to the exclusion of testimonies by defence witnesses. The balance between the party's dissolution and the freedom to form a political party guaranteed by the 2007 Constitution was not even considered.<sup>418</sup>

Moreover, in the decision annulling the election in 2014, the judges avoided assessing the fact that the inability to arrange a general election on the same day, causing an emergency, resulted from the PDRC's endeavour to hinder the process in 87 constituencies, but instead blamed the government for 'its miscalculation'. This is legally problematic because the setting of an election date is a discretionary policy matter, and the 2007 Constitution did not allow the Constitutional Court to interfere with it. Meanwhile, given that Yingluck had previously dissolved Parliament and called a general election, it was legally illogical that in the Thawil case, the Court still ordered 'the interim PM' to step down.<sup>419</sup>

By deciding the above cases on the basis of 'public order', the Constitutional Court, even in litigation unrelated to the constitutionality of emergency powers in the PCLD but decided during their use, I conclude, entailed what I call *extreme factuality*, a position prioritising political considerations/facts (even by presuming them) over and at the expense of a commitment to legality, resting on the Schmittian ethos that in times of crises, 'the state remains, whereas law [*qua* normativism] recedes.'<sup>420</sup> Here, the value of legality is undermined as it is ultimately turned into just a mere cloak for the SoE, that is, the suspension of the substance of the law. Next, I turn to the second approach adopted by the Constitutional Court—privileging rights and democracy.

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<sup>417</sup> Khemthong, 'The Constitutional Court of Thailand', pp 204-205.

<sup>418</sup> Dressel, 'Thailand: judicialization', p 90.

<sup>419</sup> See Piyabutr, *Judicial Coup*, pp 22-23.

<sup>420</sup> Schmitt, *Political Theology*, p 12.

### ***4.3.2 The ‘rights and democracy privileging’ approach: extreme legality***

The series of Constitutional Court orders between 2013 and 2014 concerning the constitutionality of the PDRC protest exemplify this approach. By vowing to replace electoral politics with ‘the People’s Council’, together with attempts to block the general election in 2014, a number of petitions were filed against Suthep before the Constitutional Court by MPs of the PT and other Red Shirts and pro-democracy activists, accusing him of attempting to seize power through undemocratic means by declaring himself sovereign, thus violating Section 68.

However, the Constitutional Court judges boldly dismissed these petitions, asserting that Suthep’s speeches concerning the People’s Council, were merely an expression of ‘opinion aimed at pressing the protesters’ demand for the government’s resignation in order to resolve the political impasse’.<sup>421</sup> For this reason, they subsequently declared the PDRC protest constitutional as an exercise of the right to freedom of political assembly certified by the 2007 Constitution, thus, in effect, implying that any use of emergency powers to dissolve the rally was unconstitutional.<sup>422</sup> Their verdict was subsequently put into effect by the Civil Court on the Black no.257/2557 (2014). However, the Constitutional Court judges did not consider the PDRC’s blatant actions of closing down government offices, blocking the general election process, hateful rhetoric, and even intimidating and assaulting people attempting to exercise their right to vote.

By comparison with the political crisis in 2010, the evidence suggests that the UDD protest was unconstitutional as the protesters had a paramilitary arm, especially the hardcore group led by Arisman Pongruangrong. It would have been absurd, especially in May, if the Constitutional Court had considered their protest to be peaceful and constitutional. However, the PDRC protest was not peaceful as the Constitutional Court affirmed, but the judges did not take into consideration these facts at all when confirming its constitutionality. Therefore, in contrast to *extreme factuality*, I call this *extreme legality* as the judgment cites legal principles without considering their ethos or the *facts* to which they apply (i.e., what happens in practice).

### ***4.3.3 An oscillation between ‘an active court’ and ‘a mute court’: Kelsen in Schmitt’s shadow?***

Overall, the main concern deduced from the above sub-sections is whether the Thai Constitutional Court really operated in the way envisaged by Kelsen. Evidenced by analysing cases related to emergency powers in the PCLD, the answer is clearly negative. Kelsen, as

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<sup>421</sup> The Constitutional Court order 50/2557 (2014), p 3

<sup>422</sup> The Constitutional Court order 63/2556 (2013), pp 3-4



discussed in Chapter 1, assumed the technical sufficiency important for insulating Constitutional Court judges from ‘direct political influence’, thus ensuring the full realisation of the PoA. The Thai experience, by contrast, reflects how such realisation was undermined by attempts by both the Red (especially Thaksin) and the Yellow factions to ensure partisan nominations of judges. Also, when it comes to highly political cases, notably those associated with political stability and the PCLD, the Thai Constitutional Court, almost from its inception, prefers to use ‘political or administrative expediency as its touchstone’, and inclines to rule in favour of dominant political elites.<sup>423</sup> However, since the colour-coded politics took place in 2006, the Constitutional Court, compared to the pre-1997 period when the judiciary played an important but passive role in legalising a coup, has increasingly been called upon to resolve the PCLD, and become more associated with the Yellow faction. Thus, in contrast to constitutional courts in some nascent democracies such as Indonesia and post-communist Hungary which play a vital role in facilitating a transition from authoritarianism to liberal democracy by using a written constitution and its democratic organisational principles as ‘touchstone’, the role in disqualifying (Red) politicians and electoral politics in order to preserve the hegemony of the *Thai-ness* tradition is a particular feature of the post-2006 Thai constitutional system.<sup>424</sup> The instances of extreme factuality and extreme legality reveal a more intense resort to political expediency to deal with an emergency situation resulting from the PCLD, thus significantly undermining the essence of the doctrine of legal imputation—the role of law in binding state power to the identity thesis. My position here is also different from Mérieau’s, who thinks that the Constitutional Court’s politically-biased activism during a series of political crises between 2007 and 2014 connoted attempts to *transform* and *transfer* the royal traditional authority to exert ‘*de facto* sovereign power’ against any threats to *Thai-ness* on the part of the judiciary.<sup>425</sup> Against Mérieau, by implicitly and explicitly *basing* their judgments, affecting the use of emergency powers in the colour-coded crises, on the need to secure the political order on *Thai-ness*, the Thai Constitutional Court in the process, still preserved royal sovereign status.<sup>426</sup> Another key point we can observe from the Constitutional Court’s partisan verdicts between 2008 and 2014 is that the judges oscillated between two stances—the Constitutional Court as ‘an active court’ and the Constitutional Court as ‘a mute court’. Apparently, the judges were

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<sup>423</sup> Harding and Leyland, ‘The Constitutional Courts’, pp 132-134.

<sup>424</sup> Dressel and Mietzner, ‘A Tale of Two Courts’, pp 402-404; Ginsburg, ‘The politics of Court’, pp 61-62; Nathan J. Brown and Julian G. Waller, ‘Constitutional courts and political uncertainty: Constitutional ruptures and the rule of judges’ (2016) 14 I•CON 817, pp 823-825.

<sup>425</sup> Mérieau, ‘Thailand’s Deep State’, pp 447, 461-462.

<sup>426</sup> See Jarun Pukditanakul’s interview in Hathaikarn, ‘King Rama IX: ‘the no.1 judge’’.

active in politics, in particular, when emergency powers were imposed against the Yellow faction. They were prepared to uphold the ethos of the PoA by intervening to protect the rights and liberties of the Yellow supporters as in 2013 and 2014, and, as Wasan inadvertently admitted, to resolve ‘disorder’ caused by the Red government’s declaration of an emergency situation as in 2008. Yet, the Court became ‘a mute court’ when the military imposed a coup and emergency powers. It was also prepared to defer to the ‘Yellow’ PM’s decisions on political crises, notably the use of emergency powers against the Red Shirts in 2010, thus justifying the action of mass massacre. In doing so, the Red faction and other pro-democracy groups, no doubt, identified them as embodying ‘double standards’.<sup>427</sup> In short, the Thai Constitutional Court performed a marginal role as the guardian of liberal constitutionalism. It played an active role only in so far as it has been used for a clear political rather than legal purpose.

In parallel with the intervention by the Constitutional Court mentioned above, the next section turns to the relation between emergency powers and the AoH bred by the colour-coded crises. I explore how the AoH affects the tension between the preservation of royal sovereign authority and the effort to put forward a commitment to liberal constitutionalism during emergencies in Thailand.

## **5. The practice of emergency powers in the colour-coded crises and the AoH**

At the outset, the colour-coded crises challenge Tan’s observation that Thailand normally deals with political problems through a coup, an observation made in 2009 is accurate only in the case of 20<sup>th</sup> century Thailand.<sup>428</sup> Between 2008 and 2014, however, there was an important progress, given that despite the 2006 and 2014 coups, there were growing efforts to use emergency legislation to deal with the colour-coded crises. Before staging a coup in 2014, Prayuth had chosen to impose martial law and hold talks among conflicting interests.

Due to the direct ideological and physical collision between the Red and the Yellow factions, no doubt, the invocation of emergency powers to deal with colour-coded politics by a particular faction against the other involves designating the other as the ‘opposition’. In reality, their impositions, regardless of form and degree, were normally praised by supporters of the government/the military simply because they castigated the opposition faction as the problem. The UDD was demonised by Abhisit and the military as *un-Thai* or as presenting threats to *Nation-Religion-Monarchy*, while Samak, Somchai, and Yingluck branded the

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<sup>427</sup> Ferrara, *Thailand Unhinged*, p 164.

<sup>428</sup> Kevin Y.L. Tan, ‘From Myanmar to Manila: a brief study of emergency powers in Southeast Asia’ in Ramraj and Thiruvengadam (eds), *Emergency Powers in Asia*, p 185.

PAD/PDRC as presenting ‘threats to the development of democracy’.<sup>429</sup> Accordingly, emergency powers applied in the colour-coded crises to foster the sense of ‘us’ and ‘them’, and therefore reinforced ‘the bonds of solidarity’, among addressees.<sup>430</sup> Given that the protesters normally claimed the right to peaceful assembly, the restrictions of this and other rights entailed by emergency powers tended to make the masses increasingly uneasy with what had been imposed on them.

Overall, calling for the use of emergency powers hastens the problem of the AoH—the protest against ‘domination/foreign will’ to which one has to submit—already bred by the colour-coded crises. Partisan social media, playing roles in broadcasting political clashes, and in criticising their responses through emergency powers and actions affecting their profile, notably the Constitutional Court’s verdicts, further exacerbate the AoH.<sup>431</sup> In the following sub-sections, the substance of emergency powers invoked during the colour-coded crises and the 2014 coup are considered. I examine how they were affected by the AoH together with the lack of consensus on what models should constitute the hegemonic basis for the exercise of emergency powers. I first consider types of emergency powers Thailand experienced between 2006 and 2014 and contemporary comments before examining their uses in practice.

### *5.1 Types of emergency powers in the colour-coded crises*

As already illustrated, there are three main forms of contemporary emergency powers in Thailand: the ISA, the 2005 Decree, and a military coup together with martial law imposed by virtue of the Martial Law Act 1914. The 2006 and 2014 coups also paved the way for the TSD. Interestingly, I also showed that the 2014 coup led to the reintroduction of M-44 enshrined in the 2014 Interim Constitution, which contained wording closely resembling M-17 of the 1959 Constitutional Charter. I use two tables to help describe the main features pertaining to these emergency powers.

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<sup>429</sup> E.g., The Emergency Declaration on 2 September 2008 and on 14 April 2009; The Preamble, the 2014 Interim Constitution

<sup>430</sup> Cf Gross and Ní Aoláin, *Law*, p 223.

<sup>431</sup> Robert Talcoth, ‘Thailand’s social media battleground’ (*New Mandala*, 26 March 2015) <<http://www.newmandala.org/thailands-social-media-battleground/>> accessed 27 September 2017.

**Table 5: Emergency laws in Thailand compared**

	<b>ISA</b>	<b>The 2005 Decree</b>	<b>Coup and martial law power (including M-44 of the 2014 Decree)</b>
<b>Declaration of a state of emergency</b>	No	Yes	Yes
<b>Authority to invoke emergency powers</b>	The Cabinet can declare an area or areas under the enforcement of the ISA without having to declare a state of emergency. <sup>432</sup>	The PM, with the approval of the Cabinet, can declare an emergency situation throughout the Kingdom or in particular parts thereof. In case the PM cannot obtain such approval in time, he/she can declare an emergency situation before seeking for the aforesaid approval within 3 days. <sup>433</sup>	The king on the advice of the military
<b>Length of the use of emergency power</b>	No specific limit	A period of emergency declared by the PM must not be in excess of three months. Successive extensions of no more than three months require the approval of the Cabinet. <sup>434</sup>	No specific limited
<b>Enforcers of emergency powers</b>	The operation of emergency powers under the ISA is supervised by the committee within the Office of the PM—the Internal Security	Formally the PM, yet, he/she holds the authority to appoint persons to be responsible for resolving a state of emergency and to issue emergency ordinances. <sup>436</sup>	The martial law declaration enables the military to take control over the normal civilian government. <sup>437</sup>

<sup>432</sup> Section 15

<sup>433</sup> Section 5 paragraph 1

<sup>434</sup> Section 5 paragraph 2

<sup>436</sup> Sections 6 and 7

<sup>437</sup> Section 6

	Command ('ISOC'). The PM a director of the ISOC by position, and the Army Commander is its deputy director. <sup>435</sup>		
<b>Emergency power</b>	Emergency powers to (a) prohibit any uses of buildings or places; <sup>438</sup> (b) prohibit exit from dwelling places or order persons to leave from a place; <sup>439</sup> (c) prohibit or impose any conditions on the use of communication routes or vehicles; <sup>440</sup> (d) prohibit or impose any conditions on the use of communication devices; <sup>441</sup> (e) prohibit the carrying of weapons out of a dwelling place <sup>442</sup>		
		Emergency powers to (a) prohibit any public gatherings or assemblies; <sup>443</sup> (b) prohibit any presentations, distributions or circulations of news or media threatening public security; <sup>444</sup> (c) remove or destroy building, structures or barriers; <sup>445</sup> (d) seize weapons, goods, or chemical substances; <sup>446</sup> (e) to ask the criminal court to issue a warrant to arrest and detain preventively persons suspected of having participated in activities threatening national security for no more than 7 days; <sup>447</sup> (f) summon persons to report before an authority; <sup>448</sup> (g) employ military forces to halt a state of emergency <sup>449</sup>	

<sup>435</sup> Section 10

<sup>438</sup> Section 18(2) of the ISA; Section 9(5) of the 2005 Decree; Section 11(7) of the Martial Law Act

<sup>439</sup> Section 18(2) of the ISA; Section 9(1) of the 2005 Decree; Section 11(6) of the Martial Law Act

<sup>440</sup> Section 18(5) of the ISA; Section 9(4) of the 2005 Decree; Section 11(4) of the Martial Law Act

<sup>441</sup> Section 18(6) of the ISA; Section 11(5) of the 2005 Decree; Section 9(2) of the Martial Law Act

<sup>442</sup> Section 18(4) of the ISA; Section 11(3) of the 2005 Decree; Section 11(5) of the Martial Law Act

<sup>443</sup> Section 9(2) of the 2005 Decree; Section 11(1) of the Martial Law Act

<sup>444</sup> Section 9(3) of the 2005 Decree; Section 11(2) of the Martial Law Act

<sup>445</sup> Section 11(4) of the 2005 Decree; Section 8 of the Martial Law Act

<sup>446</sup> Section 11(9) of the 2005 Decree; Section 11(5) of the Martial Law Act

<sup>447</sup> Section 11(1) of the 2005 Decree; Section 15.2 of the Martial Law Act

<sup>448</sup> Section 11(2) of the 2005 Decree; Section 15.2 of the Martial Law Act

<sup>449</sup> Section 11(10) of the 2005 Decree; Section 8 of the Martial Law Act

		Emergency powers directed at suppressing what the military deems as the source of political romanticism, notably dissolving Parliament, abolishing an incumbent constitution, and suspending all political activities, in particular, a general election and political campaigns by political parties
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**Table 6: Emergency powers and the limitation of rights**

<b>Limitation</b>	<b>The ISA</b>	<b>The 2005 Decree</b>	<b>Coup and martial law</b>
Right to life and liberty of a person	O	O	Liberal democracy temporarily suspended
Liberty of dwelling	O	O	
Liberty of travelling	O	O	
Right to private life	O	O	
Protection against forced labour	O	O	
Enjoyment of property right	O	O	
Right to engage in an enterprise	X	O	
Freedom of expression	X	O	
Liberty of unarmed assembly	X	O	

O = a particular right is limited by emergency powers

X = a particular right not limited by emergency powers

The two tables illustrate that among the three forms, a coup and martial law constitute the harshest form of emergency powers. As the Martial Law Act was initially enacted to ensure the security of the throne against the rise of liberal forces in the beginning of the 20<sup>th</sup> century,

it gave the king and the military absolute and extensive emergency powers such as the use of military forces or the authority to prohibit public gatherings and any presentations, distributions or circulations of news or media threatening public security. In post-absolutist Thailand, the imposition of a military coup and the subsequent application of coup decrees and martial law powers allow the suspension of elements regarded by the conservatives as the source of the colour-coded crises, namely political romanticism associated with liberal democracy, and pave the way for the junta to suspend political rights and freedoms.

By contrast, the ISA and the 2005 Decree still allow civilian government to function normally and to take the leading role in responding to an emergency. The ISA authorises the Cabinet to use the Act within a designated area without having to declare a state of emergency, and for the operation of emergency powers to be supervised by the Internal Security Command chaired by the PM. With respect to the 2005 Decree, the PM is permitted to declare a state of emergency and to establish an *ad hoc* centre for resolution of emergency situations. In terms of the types of powers, the 2005 Decree shares with the ISA several emergency provisions as shown in Table 5 such as the prohibition of the use of buildings, places, communication routes and vehicles for specific purposes. Yet, the former authorises emergency powers, similarly enshrined in the Martial Law Act, which impose greater limits upon political rights as it permits, for instance, the use of military forces and the banning of public gatherings, news or other media.

The 2005 Decree was passed under a government led by Thaksin who, as mentioned, championed authoritarian rule under the cloak of liberal democracy. To justify the 2005 Decree, he claimed that:

*‘This is a decree which makes Thailand a full democracy because we don’t use martial law any longer.’*<sup>450</sup>

However, this justification seems dubious due to a large number of provisions of the Decree seeking to consolidate emergency powers in the hands of the PM. As Connors observes, the Decree reflects ‘the highpoint of Thaksin’s legal authoritarianism’, and his effort to wrest control of emergency powers from the traditional elites.<sup>451</sup> Due to its authoritarian nature, the 2005 Decree, though enacted under the 1997 Constitution, contravenes Thai constitutional law on the following grounds. Songsak Raksaksakul, for instance, criticises the Decree for allowing the Cabinet to approve a three-month extension of the state of emergency without any

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<sup>450</sup> Thaksin’s interview in Connors, ‘Liberalism’, p 365.

<sup>451</sup> Ibid.

parliamentary approval or judicial oversight.<sup>452</sup> Meanwhile, Thanut Mingthongkam attacks the authority to arrest and detain persons under the Decree for several reasons. Firstly, the 2005 Decree allows officials responsible for dealing with an emergency situation to seek, from a criminal or provincial court, an arrest warrant without being required to secure the public prosecutor's authorisation. For Thanut, this weakens the process of checks and balances given the general role of the prosecutor in supervising the criminal process.<sup>453</sup> He also criticises the conditions of preventive detention.<sup>454</sup> The 2005 Decree prohibits the use of the following places to detain persons: a police station, a detention chamber/centre or a prison; and the treatment of that suspected person as a criminal. Nevertheless, as Thanut observes, officials are still permitted to detain persons in a military camp.<sup>455</sup> Leyland, international organisations, and NGOs have also expressed concern that the 2005 Decree fails to subject the authority to ban news and media to judicial oversight.<sup>456</sup> Worse, the Decree even allows the unaccountable resort to military force to deal with exigencies.<sup>457</sup>

The ISA was passed by a government appointed by the 2006 coup, and cites 'the present threat to national security' as the reason for it. Given that it was passed by a rightist government in response to the rise of the Red faction, the priority seems to be to attempt to reinforce the role of traditional authority in security matters.<sup>458</sup> Harding criticises the ISA for enabling the PM, with the assistance of the military commander, to exercise extraordinary powers *without* having to declare an emergency and *with no* specific time limit, and also for precipitating the leakage of these powers into the normal legal system.<sup>459</sup> He notes that the ISA creates far-reaching immunities for its operators given that the Act precludes any checks on emergency powers by the legislature or by the criminal and civil courts.

Overall, with respect to types of emergency powers, it can be said that contemporary Thailand is still struggling for liberalisation and modernisation. Authoritarian emergency

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<sup>452</sup> ทรงศักดิ์ รักศักดิ์สกุล [Sonsak Raksaksakul], 'การควบคุมฝ่ายปกครองในสถานการณ์ฉุกเฉิน' ['The State of Emergency and the Control of Administrative Agency'] (Master's thesis, Thammasat University 2006), p 110.

<sup>453</sup> ธานัท มิ่งทองคำ [Thanut Mingthongkam], 'การจับกุมและควบคุมตัวผู้ต้องสงสัยตามพระราชกำหนดการบริหารราชการในสถานการณ์ฉุกเฉิน พ.ศ. 2549' ['The Arrest and Detentions of Suspects for the Emergency Decree on Government Administration in Emergency Situations B.E. 2005'] (Master's thesis, Dhurakij Pundit University 2006), p 99.

<sup>454</sup> Ibid, pp 91-92.

<sup>455</sup> Ibid.

<sup>456</sup> Peter Leyland, 'Thailand's Constitutional Watchdogs: Dobermans, Bloodhounds or Lapdogs?' (2007) 2 JCL 151, p 172; 'Thailand: Repeal Emergency Decree Authorities Use Draconian Law to Violate Rights and Obstruct Justice' (*Human Rights Watch*, 24 November 2010) <<https://www.hrw.org/news/2010/11/24/thailand-repeal-emergency-decree>> accessed 10 November 2017.

<sup>457</sup> Cf Steven Greer, 'Military Intervention in Civil Disturbances: The Legal Basis Reconsidered' [1983] Public Law 573.

<sup>458</sup> Connors, 'Liberalism', p 368.

<sup>459</sup> Harding, 'Emergency powers', pp 306-311.



provisions reflect the attempt to subvert the project of building liberal constitutionalism from within, in particular, by those who enact emergency legislation. Actually, this problem is not uncommon. Even in the West, emergency powers, especially anti-terrorism laws, often raise concern over human rights violation.<sup>460</sup> In practice, the ISA, the 2005 Decree, and the Martial Law Act are currently being applied to deal with Muslim separatist militants in the South. Although this thesis is not concerned with emergency powers and terrorism, my point here is that unlike the case of the South Thailand Insurgency, the effectiveness of these emergency laws in the PCLD depends on ‘who’ (and ‘against whom’) apply them. It is also interesting to note that although the ISA was initiated by the junta-appointed government, its provisions, though still flouting human rights standards, are far less draconian than the 2005 Decree which was passed under the civilian-elected government, apparently at least partly due to the junta’s attempt to avoid a ‘further tarnished image’ resulting from their disrespect for liberal constitutionalism. What is more, the country also experiences attempts by forces external to a written constitution, notably the conservative elites and the military, to preserve the status quo through coups. Yet, given the 1997 constitutional reform, the rhetoric of liberal constitutionalism has, at least, become a more important and more acceptable basis of legitimacy, making the practice of a coup politically less legitimate.

## ***5.2 Emergency powers in practice***

Having considered the features of emergency powers applied in the colour-coded crises, I consider below the uses of above emergency powers in practice. I first assess the uses of emergency powers by the civilian governments of the Red and Yellow factions before turning to the 2014 coup. I intend to show that despite the flaws pertaining to Thailand’s emergency legislation, there is a growing tendency to liberalise the uses of emergency powers.

### ***5.2.1 The Red and the Yellow governments’ emergency actions***

The rise of an active citizenry in modern Thailand has significantly affected the pattern of the application of emergency powers in the contemporary PCLD. As I showed in Chapter 2, it was obvious that when invoking emergency powers between 2008 and 2014, both the Red and the Yellow factions had been more meticulous compared to the military in 1973 and 1992, in particular, to avoid exacerbating the AoH already bred by the colour-coded crises. Between 2008 and 2014, army commanders, Anupong and Prayuth, baulked at staging a coup, and both sides increasingly avoided employing emergency powers curbing protesters’ freedom of expression and political assembly. Where Samak and Somchai invoked the 2005 Decree to deal

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<sup>460</sup> Dyzenhaus, *The Constitution*, pp 174-196.

with the PAD, Abhisit and Yingluck chose to apply initially the less draconian ISA before using the 2005 Decree.<sup>461</sup>

#### *5.2.1.1 The imposition of the ISA*

The announcement of the imposition of the ISA, and the types of emergency powers used by Yingluck, imitated those of Abhisit verbatim. Both PMs, under the guide of the Internal Security Command, chose to restrict the enforcement of the ISA to a specific time limit and only a limited range of emergency powers was used, namely the prohibition of the use of buildings, premises or areas within the time limit; the prohibition on carryings weapons outside dwellings; and the imposition of conditions on the uses of communication routes and communication/electronic devices for any or certain purposes.<sup>462</sup>

Though the ISA contains, in Kelsen's words, 'legal-technical deficiencies', which compromise the rule of law, its application here was less opposed by both protesters and the traditional elites behind the scene at least in the sense that, compared to the invocation of the 2005 Decree, the military and the Constitutional Court did not disrupt its application by the Red government. The ISA does not, for example, permit the dispersion of protesters, the use of military force, or censoring the media. When invoking the ISA, Abhisit and Yingluck outwardly declared that such invocation was largely directed at ensuring the safety of the protesters and the preservation of public order in general, rather than at dissolving protests.<sup>463</sup> In practice, the government typically set up security checkpoints to hamper carrying weapons, while the protesters were allowed to gather and make speeches. This strategy indicates that both the Red and Yellow governments increasingly saw the commitment to the liberal democratic ethos necessary for justifying their emergency schemes.

Next, I turn to the imposition of the 2005 Decree in practice. In contrast to the application of the ISA, I argue that the invocation of the 2005 Decree tended to exacerbate the AoH already bred by the PCLD.

#### *5.2.1.2 The imposition of the 2005 Decree*

I begin this sub-section by using the table below to illustrate the types of emergency powers under this legislation applied by all four governments.

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<sup>461</sup> See Table 2 in Section 13 of Chapter 2

<sup>462</sup> The ISA declarations on 10 March 2010, on 25 November 2013, and on 18 March 2014

<sup>463</sup> Ibid

**Table 7: Types of emergency powers used by the Red and Yellow governments**

Emergency powers under the 2005 Decree	Incidents/names of PM				
	The 2008 PAD protest/ Samak <sup>464</sup>	The 2008 PAD Airport crisis/ Somchai <sup>465</sup>	The 2009 UDD protest/ Abhisit <sup>466</sup>	The 2010 UDD protest/ Abhisit <sup>467</sup>	The 2013-2014 PDRC protest/ Yingluck <sup>468</sup>
The prohibition of public gatherings of more than 5 people	O	O	O	O	O
The prohibition of distributions/presentations/circulations of news or media likely to provoke public chaos	O	X	O	O	O
The prohibition of the use of buildings and of any entering to designated areas	O	O	O	O	O

<sup>464</sup> The Emergency Order on 2 September 2008

<sup>465</sup> The Emergency Order on 27 September 2008

<sup>466</sup> The Emergency Orders on 12 April 2009

<sup>467</sup> The Emergency Orders on 7 April 2010 and 19 May 2010

<sup>468</sup> The Emergency Orders on 21 January 2014 and 23 January 2014

The evacuation of persons from particular areas	O	O	O	O	O
The arrest and detention of persons suspected of causing an emergency	X	X	O	O	O
The authority to summon persons to report to an official or furnish him/her with a statement or evidence	X	X	O	O	O
The seizure of weapons or other objects believed to have been used or to be used to provoke an emergency	X	X	O	O	O
The destruction of building or premises to stop an emergency	X	X	O	O	O
The authority to check or censor individual communication	X	X	O	O	O

The prohibition of a person suspected of causing/involvement in an emergency from leaving the Kingdom	X	X	O	O	O
The deportation of aliens suspected of provoking an emergency	X	X	O	O	O
The imposition of restrictions on the possession of weapons or chemical substances or any objects potentially be exploited to provoke an emergency	X	X	O	O	O
The employment of military forces to assist civilian authorities	O	O	O	O	O
Curfew	X	X	X	O	X

X = emergency powers used

O = emergency powers not used

According to Table 7, some types of emergency powers were ‘standard types’ which, with the exception of curfew, all four PMs similarly employed, notably the banning of public gatherings. With the exception of curfew, Yingluck again adopted the template of Abhisit’s declaration of an emergency in 2010. Both also resorted to more draconian emergency powers such as the authority to arrest and preventively detain suspects, to deport aliens/prohibit suspected persons to leave the Kingdom, and to summon suspects to present themselves before officials. These powers were clearly directed at limiting the protesters’ freedom of expression and ultimately at ending the protests.

Nevertheless, the difference, as indicated, was that where the Yellow government could prolong the declaration of a state of emergency under the 2005 Decree such as in 2010, the military and the Constitutional Court were ready to disrupt its application by the Red government in 2008 and 2014. As I showed in Chapter 2 (Tables 2 and 3), Abhisit extended its operation for half a year in 2010, whilst those by the Red governments were terminated, following the Constitutional Court’s intervention, before the maximum period of three months. An emergency declared by Samak and Somchai lasted only two weeks, while that invoked by Yingluck lasted less than two months. Yet, emergency powers invoked by Abhisit led to the shutdown of the UDD’s television stations and culminated in the brutal military crackdown in 2009 and 2010, causing greater polarisation between the two factions. Interestingly, though Samak and Somchai ordered the banning of public gatherings of more than five people, this proved futile given the resistance to comply by both the military and the PAD. In the case of Yingluck, despite invoking emergency powers to ban protests and censor the media, she chose not to shut down the PRDC’s television stations nor to send troops to disperse protesters just as Abhisit had. However, if she had decided to do so, Prayuth would have undoubtedly refused. By contrast, although the declarations of the 2005 Decree ended the two UDD protests in 2009 and 2010, scholars, the TRC, and the Human Rights reports harshly condemn Abhisit for the widespread abuses of emergency powers, notably the ‘shoot-to-kill’ strategy, yet, make no criticism of its invocation by Yingluck given its ineffectiveness as well as of the imposition of the ISA by both PMs especially the prohibition on the use of force to disperse protests.<sup>469</sup>

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<sup>469</sup> Hsien-Li Tan, *The ASEAN Intergovernmental Commission on Human Rights Institutionalising Human Rights in Southeast Asia* (CUP 2011), p 108; The U.S. Department of State, ‘2010 Country Reports on Human Rights’ (Bureau of Democracy, Human Rights, and Labor Practices 2010); The U.S. Department of State, ‘2014 Country Reports on Human Rights’ (Bureau of Democracy, Human Rights, and Labor Practices 2014).

### 5.2.2 *The 2014 coup*

In 2013, the unpopular Amnesty Bill provided an opportunity for the ‘Yellow’ elites to totally eradicate the Red faction and to tame other pro-democracy movements. The formation of the PDRC came with the return of the game plan to engineer political paralysis and chaos just as the PAD protest in 2008 paved the way for the intervention by the Constitutional Court and the military.<sup>470</sup> In other words, as in 2006, coups based on the *Thai-ness* justification in 21<sup>st</sup> century Thailand have to rely more and more on ‘the masses’, helping to create a ‘power vacuum’ that enables the traditional elites and the military to intervene in the name of restoring ‘public order’.

Compared to its 2006 predecessor, the degree of repression under the 2014 junta was much harsher given that the military staged a coup and declared martial law in 2006 mainly to topple Thaksin. Though the 2006 coup led to the temporary dissolution of parliamentary democracy, it avoided violent means such as the M-44 provision in the 2006 Interim Constitution, and swiftly restored electoral politics after 1 year. The 2014 junta, by contrast, seeks to prolong its power, through strong-arm tactics. Though vowing to restore parliamentary democracy, Prayuth keeps postponing a general election. In 2015, it replaced the rule of martial law, declared during the coup, with the NCPO leader order no.3/2558 (2015) enacted by virtue of M-44, bestowing upon military officers several powers, namely the arrest and detention of people for no more than 7 days, the imposition of *lèse-majesté* charges, searches, the seizure of goods and weapons, media censorship together with the ban of advertisements, and the issuance of orders summoning suspected people to present themselves before military officials, directed at repressing the UDD leaders and other progressive political activists to prevent another round of massive protests. Leaders of university scholars and student activist groups were charged and jailed for launching an anti-coup protest.

Here, it is obvious that the 2014 junta resorted to the more draconian M-44 rather than the ISA or the 2005 Decree to deal with the colour-coded politics. However, in contrast to the invocation of the ISA and the 2005 Decree, no time limit is set for the application of Order no.3/2558 (2015). Besides, the latter is exclusively supervised by the Head of the NCPO and is not subject to constitutional review. Also, with respect to their authority to arrest and preventively detain persons, unlike under the 2005 Decree, the military officials neither have to seek a warrant from, nor submit a written record of arrest and detention to, a criminal court.

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<sup>470</sup> Ferrara, *Political Development*, pp 245.

Yet, since 2006, polarised views concerning Thaksin Shinawatra have enabled the Yellow faction to justify the TSD. However, due to the rise of active citizenry, the Thai military is simultaneously aware of the ‘heavy cost’ entailed by ‘mass massacre’ as in 1992, 2009 and 2010. The combined effect of these facts is that the more harshly these coup powers violate liberal democratic constitutionalism, but are applied restrictively to the UDD leaders and some prominent pro-democracy activists, the more effectively they can prevent another round of mass pro-democracy protest, yet, at a cost of restoring political unity.

### ***5.3 Vasuki Nesiah’s three deficits: law, norm, and institution***

From the above, I conclude that the overall picture of the practice of emergency powers in the Thai PCLD can be theorised in light of what Vasuki Nesiah regards as ‘the three types of deficits’ pertaining to the issue of emergency powers: *law*, *institution*, and *norm*. In her chapter on emergency powers in Sri Lanka, Nesiah proposes these factors to assess the abuse of power and how to ensure the compliance of emergency powers with liberal constitutional principles. For several reasons, the Thai case however reflects how these deficits are interrelated and conflict with one another.

To begin with, the Thai experience exposes a *law deficit*, that is, deficiencies in formal legal constraints on emergency powers.<sup>471</sup> Relevant emergency legislation, notably the ISA, the 2005 Decree, and the Martial Law Act, contain provisions bestowing broad and deferential emergency powers upon the executive and the military, possibly flouting the constitutional entrenchment of individual rights and liberties and providing an open-ended impunity.<sup>472</sup> According to Nesiah, this problem may be attenuated by enacting emergency regulations which clearly define ‘the areas they cover’ and by explicitly defining fundamental rights that such laws cannot violate.<sup>473</sup> However, these solutions are excessively ambitious in Thailand given that the aspiration of liberal constitutionalism is still, as I already mentioned, subservient to the long-entrenched coup/authoritarian culture. Due to Thailand’s lack of a strong liberal-democratic culture, the PoA set up in the 1997 Constitution and other legal constraints such as a defined time limit and legitimate purposes for emergency powers are doomed to fail. However, despite various attempts to subvert ‘legality’ during emergencies, emergency powers in the Thai PCLD largely challenge the understanding of the other two elements—norm and

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<sup>471</sup> Vasuki Nesiah, ‘The princely imposter: stories of law and pathology in the exercise of emergency powers’ in Ramraj and Thiruvengadam (eds), *Emergency powers in Asia*, p 127.

<sup>472</sup> Ibid, pp 128-129.

<sup>473</sup> Ibid.



institution deficit—and suggest rethinking the function of ‘law/constitutionalism’ during exigencies.

With respect to *a norm deficit*, where Nesiah speaks of this as a ‘*deficit*’, the Thai case suggests that we should consider it in the light of the challenge by rising liberal demands. The Yellow faction’s intense attempts to maintain *Thai-ness* even at the expense of liberal democracy is a clear indication of the absence of what Nesiah regards as ‘the integration of rule-of-law norms into political and legal practice but also in the public sphere at large.’<sup>474</sup> However, notwithstanding the norm and law deficit, the rise of an active citizenry reflects their role as a ‘shadow constitutional court’ in patrolling and determining the exercise of state authority during the PCLD, thus forcing the Thai authorities to be more aware of the culture of liberal constitutionalism and leading to their effort to liberalise emergency powers which, in turn, helps alleviate the law deficit problem.<sup>475</sup> The comparison between the application of the ISA and the 2005 Decree indicates that the less those authorities disregard liberal values, the more likely they do not exacerbate the problem of the AoH already bred by the PCLD. This simultaneously reflects the lasting political impact of the 1997 Constitution on the use of emergency powers. Today, its aspiration for liberal constitutionalism is having, in Ginsburg’s words, ‘an afterlife’—an impact in strengthening contending liberal demands among citizens after the formal death of this particular constitutional text as a result of the 2006 coup.<sup>476</sup> This afterlife impact further hastens a paradox. On the one hand, it calls for the greater need to co-opt liberalism which, in turn, threatens the hegemony of *Thai-ness* and therefore the status quo of the Yellow elites. Nevertheless, given the greater gravitational pull of liberal forces, repressing them requires ‘harsh and sustained enough’ emergency powers.<sup>477</sup> As liberal demands are ongoing, this tactic tends to create a greater rift within society, and undermines the future prospects for a peaceful resolution to the PCLD and the long-term legitimacy of the Yellow faction itself.

Lastly, Nesiah defines *an institutional deficit* as (a) the absence of a judiciary equipped with authority to annul emergency powers flouting liberal democratic standards and values; and (b) a marked judicial deference to the military or the executive when reviewing emergency powers.<sup>478</sup> She assesses these elements as part of the failure to impose ‘checks and balances

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<sup>474</sup> Ibid, p 131.

<sup>475</sup> Victor V. Ramraj, ‘Constitutions and emergency regimes in Asia’ in Dixon and Ginsburg (eds), *Comparative Constitutional Law*, p 219.

<sup>476</sup> Ginsburg, ‘Constitutional afterlife’, pp 83-84.

<sup>477</sup> Ferrara, *Political Development*, p 291.

<sup>478</sup> Ibid, p 129.

that monitor and contest illegitimate emergencies'.<sup>479</sup> The active role of the Thai Constitutional Court in intervening in politics during the application of the 2005 Decree to protect rights and liberties of the PAD/PDRC protesters (the 'rights and democracy privileging' approach) ironically repudiates this deficit. However, if considering the Court's discriminatory intervention, in particular, its adoption of the 'state privileging' approach together with a law and norm deficit and given that the Red and Yellow government were prone to follow a similar blueprint/verbatim to deal with a political crisis, the main problem in Thailand is not quite how to impose sufficient formal legal constraints on emergency powers. Rather, the pivotal challenge is how to deal with the problem of 'double standards' pertaining to their invocation as perceived by the Red faction.

## **6. Conclusion**

Here, I conclude my answers to the four research questions in this chapter as follows. With respect to the first, it appears that the constitution-making process has increasingly provided a vital means for traditional elites to compete with liberal forces but at the cost of modernising and transforming the traditional notion of legitimate emergency powers. Meanwhile, the answers to the second and fourth questions can be summarised as follows. It appears that in the context the PCLD, the more emergency powers are exercised in a liberal manner, the more the AoH is at least not dramatically exacerbated. But, due to the country's strong authoritarian culture, the full implementation of the PoA is hardly likely. In this fashion, to facilitate the liberalisation of emergency powers, the Thai case then calls for greater account to be taken of 'political fact' outside the closed, self-referential system of law.

As for the third research question, it appears that the two spectrums—*extreme factuality* and *extreme legality*—indicate 'the gravitational pull' between the liberal-democratic and anti-liberal realist views on emergency powers in the PCLD. Due to rising liberal demands, the politicisation of the Constitutional Court, as shown by *extreme factuality*, further puts into effect the institutionalisation of anti-liberal realist ideas inherent in the *Thai-ness* tradition within the realm of legal 'ought', thereby retaining the possibility of a coup in the context of liberal-democratic norms and institutions. Meanwhile, ensuring such a possibility has to contend with the fact that, since the 1997 constitutional reform, coups have been increasingly discredited by sturdier liberal forces, while legal-rational legitimacy has become the more widely legitimate source of political authority. The case of *extreme legality* suggests that despite their scepticism about liberal values, the Yellow faction is ready to embrace the PoA

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<sup>479</sup> Ibid, p 130.

to protect its self-interest. The royalist complexion of the Constitutional Court also allows the Yellow elites to suppress without mounting a coup what they deem to be the source of emergencies and the PCLD—liberal democracy and the Red faction—through a legal-rational mechanism.

Ultimately, behind the direct ideological and physical collision between the Red and the Yellow factions, both sides have struggled to put forward their own conception of political authority/legitimacy and to reject those of the other. Yet, it seems that the Yellow faction has had to pay a heavier price as the more it resorts to military coups, the more it cultivates, rather than pacifies, social polarisation. In the following chapter, I will use the findings in this chapter to reconsider and synthesise elements pertaining to Kelsen's and Schmitt's constitutional emergency model, including the alternative normative perspective for understanding the Kelsen-Schmitt debate.



## **Chapter 4: The struggle over emergency powers in Thai political crises: the Kelsen-Schmitt debate revised?**

### **1. Introduction**

In this chapter, I aim to address the key research question of this PhD thesis—*Are there any elements of their models of constitutional emergencies which may need to be reconsidered/re-read in order to accommodate the Thai experience?* Here, I apply my analyses in the light of the *internal* and *external* perspectives of the constitutional emergency model to reconsider and synthesise Kelsen's and Schmitt's theories of law and politics and their theoretical approaches. As illustrated in Chapter 3, from the *internal* perspective, Thai nascent democracy suggests the extent to which each of their constitutional emergency models might each be adapted to (re-)assert its political legitimacy, hegemony, and authority against the increasing contestation by the opposing model. By contrast, the *external* perspective invites us to reconsider the application and justification of the two models in the context of direct ideological and physical collision between liberal movements and anti-liberal realist forces, which already breed the AoH and the PCLD. Yet, in this respect, the AoH has to struggle with the total lack of consensus on whether the Kelsenian or Schmittian approach should constitute the hegemonic model of constitutional emergencies.

In Section 2, I revisit the asymmetry between Kelsen and Schmitt as jurists/theorists and the raw conflicting interests/values each endorsed. I apply the Thai experience to explain the deficiencies of the normative perspectives underlying their models—*individualism/collectivism*, *scepticism*, and *hostility*—by turning to the following pragmatic considerations, namely (a) the *dual state* explanation recently used by some scholars to describe the colour-coded crises; and (b) the asymmetry between 'an intra-systemic interest' and a conflict of interest ('CoI'). In Section 3, I focus upon the *internal* perspective of the constitutional emergency model to reconsider the Kelsenian and Schmittian competing concepts of 'institution' and their theoretical approaches to law and politics through the lens of the Thai experience. Based on my findings in Section 2, I strive to draw the general features of the alternative normative perspective for reading and understanding the Kelsen-Schmitt debate—the *pragmatic hybrid*. This alternative perspective, I argue, generally asserts that both constitutional emergency models cannot be fully implemented as suggested by the original normative perspectives. Instead, their substances and their relationship must be reconsidered and synthesised subject to what I call 'the paradoxical friction' which reflects the gravitational pull between what I call 'Schmitt in Kelsen' and 'Kelsen in Schmitt'. The former signifies the

legitimacy of the Schmittian model in an increasingly sturdy liberalised society, while the latter connotes the Kelsenian alternative in the context of the dominant Schmittian model.

To clarify the substantive details of the pragmatic hybrid, I turn to the *external* perspective of the constitutional emergency model. I argue that the colliding attempts to assert the legitimacy of the Kelsenian and the Schmittian models, if examined based on the dichotomy between value-judgment ‘*ought*’ and authority ‘*is*’, comprise two subordinate issues. Based on these two issues, I revisit the key elements of their theories of law and politics, namely their debate on the norm-exception dichotomy in relation to the problem of the AoH by developing what I call *the politics of defective co-optation* (‘PDC’) (Section 4) and the relation between the concept of the SoE, emergency authority, and the problem of accountability (Sections 5-7). In Sections 6 and 7, I not only re-examine the relation between the SoE, the PTL, the CoP, and Schmitt’s three types of juristic thought, but also the roles of the SoE in the PCLD itself. Next, in Section 8, I seek to reconsider modifications for Kelsen and Schmitt in the context of the growing importance of liberal constitutionalism and the rise of the masses as suggested by contemporary scholars. Their application to the pragmatic hybrid in Thailand exposes what would be ‘inappropriate modifications’ and, in particular, the counter-productiveness of the ‘liberal-type’ Weberian straight-line. Lastly, in Section 9, I propose reconceiving the Kelsen-Schmitt debate on the scope of emergency powers in the PCLD in terms of *a fragile equilibrium* which recommends the alternative function of liberalism, that is, as a policy device for mitigating any exacerbation of a CoI, the AoH, the paradoxical friction, and the PDC. This also involves the reconsideration of the approach underlying Kelsen’s and Schmitt’s models—the Weberian straight-line.

## **2. Revisiting the normative perspectives of individualism/collectivism, scepticism, and hostility: ‘Schmitt in Kelsen’ and ‘Kelsen in Schmitt’**

As we have seen, the Thai experience ostensibly exposes the asymmetry between Kelsen and Schmitt as jurists/theorists and Kelsen and Schmitt as representatives of raw conflicting interests and values in the PCLD. It mirrors the ongoing competition between (a) the attempt to subject emergency powers to democratic constitutional laws/constraints and to implement liberalism as the state’s fundamental value as Kelsen favoured; and (b) the *Thainess* tradition merged with the rightist-conservative constitutional views on emergency powers sponsored by Schmitt. This competition subsequently reveals the absence of dominant liberal values, notably pluralism and liberal constitutionalism, necessary for realising Kelsen’s PoA, while a shared belief in ‘anti-liberal realism’, essential for realising the Schmittian existential

concept of the constitution, is declining. To explain this argument, two main issues need to be reconsidered.

At the outset, the aforesaid absence and decline ask us to re-examine the possible theoretical framework for explaining how Kelsen and Schmitt might be related to each other in the Thai context—the dual state explanation originally proposed by Ernst Fraenkel, a Jewish-German lawyer, and recently applied by Amsterdam, Chambers and Napisa, and Mérieau, who redefines it as ‘deep state’, to explain and analyse the PCLD in Thailand. Although the *dual state* model is not the theory of emergency powers, the understanding of its deficiencies enables us to gain comprehensive insight into what the synthesis of the Kelsen-Schmitt debate should consider. Nevertheless, it is simultaneously obvious that such absence and decline can also be explained in terms of the struggle between ‘divergent interests’—the right-wing conservative and liberal forces—in the real-world political arena. This accordingly asks us to revisit the notion of ‘interest’ addressed by Kelsen and Schmitt.

### ***2.1 The dual state explanation reconsidered***

In his *Dual State*, Fraenkel assessed how ‘the autonomy of law’ advocated by Kelsen interacted with, and was eventually trumped by, ‘conceptual sovereign decisions’ favoured by Schmitt after Hitler’s rise to power put an end to the PCLD plaguing the Weimar Republic.<sup>480</sup> He explained this scenario in terms of what he called the *normative* and *prerogative* states. Fraenkel defined the former as ‘an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies.’<sup>481</sup> Conversely, the latter connotes ‘[the] governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees.’<sup>482</sup> Fraenkel considered the *Gestapo* (secret police) and the Nazi Party (the NSDAP) as the agents of the latter, and argued that the prerogative ‘Nazi’ state functioned to undermine or restrict the operation of its normative counterpart in national security matters, notably by restricting and even abolishing constitutional constraints on emergency powers invoked to repress ‘public enemies’ such as the communists and the leftist social democrats.<sup>483</sup>

Applying Fraenkel’s thesis to Thai political crises, Amsterdam, Chambers and Napisa equate the normative state to a civilian government under the liberal parliamentary regime, and

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<sup>480</sup> Yoav Mehozay, *Between the Rule of Law and States of Emergency: The Fluid Jurisprudence of the Israeli Regime* (Suny Press 2016), p 14.

<sup>481</sup> Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (.A. Shils, Edith Lowenstein, and Klaus Knorr (trs), OUP 2017), p xxiii (introduction by Jens Meierhenrich).

<sup>482</sup> Ibid.

<sup>483</sup> Ibid, pp 7, 24-25, 71.

the prerogative (or ‘deep’) state to the ‘Yellow’ network of royalist-conservative elites, especially in the Privy Council, bureaucrats, the military, and judges, operating autonomously and informally from the civilian government and possessing its own rules and hierarchical institutional order.<sup>484</sup> Méricau adds that if the latter perceives an existential threat to *Thai-ness* posed by the former, it may declare an emergency, in particular, by mounting a coup d’état and declaring martial law.<sup>485</sup>

Overall, the dual state explanation asserts that the normative state exists only as far as the prerogative state tolerates it. Accordingly, this explanation then gives primacy to Schmitt’s theses over Kelsen’s by tacitly supporting the following theoretical positions proposed by the synthetic reading of Scheuerman’s and Gross’s arguments on the one hand and Dyzenhaus’s thesis on the other. Firstly, from the liberal perspective, it reflects, in Scheuerman’s words, the picture of Kelsen’s ‘formal/impersonal conception of legal normativity’ succumbing to Schmitt’s anti-normativist theory of emergency powers—the *normless* will of the sovereign.<sup>486</sup> Gross worries that as the sovereign (who, more broadly, acts in concert with other agents of the prerogative state) is unconstrained by a positive law in times of crises, he might perpetuate the imposition of his emergency authority which facilitates ‘not only a normless exception, but also an exceptionless exception’.<sup>487</sup> Secondly, it confirms Dyzenhaus’s comment that Kelsen’s theory of law simply offers ‘an empty proceduralism’ which precipitates ‘anything-goes relativism’ or the neutrality which provides ‘a ready justification’ for any content, thus failing to safeguard a liberal-democratic legal order from the encroachment by the prerogative state and reducing the former merely to the dependent normative state.<sup>488</sup>

In the light of my analysis in Chapter 3, both positions associated with this *dual state* explanation disregard the *internal* perspective of the constitutional emergency model. While the synthetic reading of Scheuerman and Gross is silent on the legitimacy of the Schmittian model in an increasingly sturdy liberalised state and society, Dyzenhaus’s thesis does not assess that of the Kelsenian alternative in the context of the dominant Schmittian model. I briefly call the former ‘Schmitt in Kelsen’, and the latter ‘Kelsen in Schmitt’. The details of Scheuerman’s,

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<sup>484</sup> Chambers and Napisa, ‘The Resilience’, p 427; Robert Amsterdam, ‘Thailand through the prism of the dual state’ (*New Mandala*, 29 August 2011) <<http://www.newmandala.org/amsterdam-on-thailands-dual-state/>> accessed 29 January 2018.

<sup>485</sup> Méricau, ‘Thailand’s Deep State’, p 460.

<sup>486</sup> McCormick, ‘Max Weber’, p 315; William E. Scheuerman, ‘Carl Schmitt’s Critique of Liberal Constitutionalism’ (1996) 58 *Rev. Politics* 299, pp 314-315.

<sup>487</sup> Gross and Ní Aoláin, *Law*, p 169.

<sup>488</sup> See Dyzenhaus’s comment in Chapter 1. David Dyzenhaus, ‘States of Emergency’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012), p 444; William E. Scheuerman, ‘Emergency powers’ (2006) 2 *Annu. Rev. Law Soc. Sci.* 257, p 259.



Gross's, and Dyzenhaus's arguments here will also be assessed and rebutted in subsequent sections where relevant. Now, I turn to the notion of 'interest' internal to Kelsen's and Schmitt's models.

## ***2.2 The asymmetry between 'intra-systemic interest' and 'conflict of interest'***

As indicated in Chapter 1, the realisation of the PoA and the anti-liberal realist model is grounded in what I call *the Weberian straight-line*, that is, the claim that the imposition of state authority, involves the endorsement or rejection of any prized value. The presumption of the value that makes Kelsen's PoA and Schmitt's realist model *qua* the CoP effective is then derived from an interest or disinterest in liberal constitutionalism and democracy. In this light, it appears that 'interest' is understood in terms of as 'desires', 'volition', and ultimately as 'a motor-affective attitude'.<sup>489</sup> However, there is another facet of 'interest' apparent in the Kelsen-Schmitt debate on emergency powers in the PCLD, namely a CoI which connotes 'conflicting egotistic opinions' towards a particular political ideology, notably between nationalist authoritarianism or liberalism, deepening the problem of the AoH.<sup>490</sup> As with the 'intra-systemic interest', interest here is also bound to 'value'.

Initially, I should recall that both scholars, by underlining the closed, self-referential constitutional system, also shared with Weber the view that the masses are 'always exposed to momentary, purely emotional and irrational influences.'<sup>491</sup> Accordingly, Kelsen, seeing it as a mark of authoritarianism, opposed the will of a single person who represents the particular people to the exclusion of political enemies and stands outside/beyond the PoA, whilst Schmitt emphasised the homogeneous people *qua* a *voiceless* object subsumed within the system of politics.<sup>492</sup> Against these original theses which confine the multitude within, and deal with a CoI through, the state system, the rise and influence of an active citizenry over the application of emergency powers is apparent in Thailand.

Owing to such developments, the asymmetry between Kelsen and Schmitt as jurists/theorists and the raw conflicting interests/values each endorsed, in effect, exposes the sub-asymmetry between an intra-systemic interest and a CoI. On the one hand, the application and institutionalisation of the Schmittian model (i.e., the intra-systemic *disinterest* in 'liberal value'), as in the colour-coded crises, becomes more likely to conflict with political struggles for Kelsenian perspectives. The presence of the UDD and other pro-democracy activists are

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<sup>489</sup> Kelsen, *What Is Justice?*, p 211.

<sup>490</sup> Kelsen, *GTLS*, p 13; Schmitt, 'Pluralism', p 144.

<sup>491</sup> Andreas Anter, *Max Weber's Theory of the Modern State: Origins, Structure and Significance* (Palgrave Macmillan 2014), p 72; Max Weber, 'Parliament', p 231.

<sup>492</sup> Scalone, 'Führerprinzip', pp 31-32.

good examples. Nevertheless, the mass mobilisation which supports ‘Schmitt in Kelsen’ and generates a ‘political vacuum’, paving the way for coups and martial law, compromises Kelsen’s attempt to resolve the CoI and AoH associated with emergency powers in the PCLD through the self-referential, liberal system of law (i.e., intra-systemic interest in liberalism). Accordingly, emergency powers in Thai political crises highlight the importance of recognising that the greater the intensity of the PCLD, the more it compromises the effectiveness of the constitutional emergency models constructed upon the closed, self-referential system of either law or politics. The Thai experience then emphasises how the Weberian straight-line underlying Kelsen’s and Schmitt’s models fails to address the asymmetry between ‘an intra-systemic interest’ and ‘a CoI’. It accordingly calls for redrawing the relationship between emergency authority, the masses, and liberal standards under the original Kelsenian and Schmittian models by considering ‘Schmitt in Kelsen’ and ‘Kelsen in Schmitt’.

### **2.3 Key remarks**

Overall, ‘Schmitt in Kelsen’ and ‘Kelsen in Schmitt’ in Thailand reveal the situation whereby the Kelsenian and Schmittian models cannot avoid accommodating each other, exposing the deficiencies of the original normative perspectives underlying both. The alternative normative perspective, I argue, has to consider the following two elements. On the one hand, it denies the endorsement of liberalism or anti-liberalism based exclusively on either political relativism and the politics of reconciliation (*individualism*) or the radical form of communitarianism and the politics of exclusion (*collectivism*). It also resists *scepticism* and *hostility* which concern the sceptical view about and the total rejection of liberalism and anti-liberalism. It then theoretically asks how the ‘*is-ought*’ relation according to the Weberian straight-line and the relation between law and politics in Kelsen’s and Schmitt’s models should be redrawn. In the light of ‘Schmitt in Kelsen’ and ‘Kelsen in Schmitt’, I call this alternative normative perspective for the Kelsen-Schmitt debate *the pragmatic hybrid*.

### **3. Pragmatic hybrid qua the gravitational pull between ‘Schmitt in Kelsen’ and ‘Kelsen in Schmitt’: revisiting the Kelsenian and Schmittian competing conceptions of ‘institution’ and their theoretical approaches to law and politics**

To explain the general ideas of the pragmatic hybrid, I need to revisit the *internal* perspective of the constitutional emergency model and, in particular, the Kelsenian and Schmittian competing conceptions of ‘institution’ and their theoretical approaches to law and politics. As indicated in Chapter 1, criticising the PTL for turning the state into ‘the mechanical, soulless state’, Schmitt’s anti-liberal realist theory of law is premised on the notion of

‘institution’ *qua* a concrete order.<sup>493</sup> By contrast, believing that sovereign authority constitutes a mark of authoritarianism, Kelsen’s legal accommodation model connotes law as ‘a specialised instrument’ functioning to realise the identity thesis. In the next two sub-sections, I reconsider these competing conceptions and approaches in the light of ‘Schmitt in Kelsen’ and then ‘Kelsen in Schmitt’.

### ***3.1 ‘Schmitt in Kelsen’ and four main ways ‘legality’ theoretically institutionalising sovereign authority: ‘iron cage shattering’ authority reconsidered***

With respect to Schmitt’s concept of ‘institution’ *qua* concrete-order framework, it follows that neither the contents of the sovereign’s decisions nor their legitimacy are derived from legal-rational authority. Hence, contrary to Kelsen’s identity thesis, Schmitt’s notion of ‘institution’ indicates that sovereign authority is not, and *cannot* be, institutionalised by a written law. Instead, a positive law can at best play a role in defining who is the sovereign, but it is the sovereign’s emergency decisions to revive the SoE by switching off any legal provisions and transcending their constraints that exemplify sovereign authority.<sup>494</sup> However, according to my analysis in Chapter 3, given that the conflict between the Schmittian and Kelsenian models is being played out in the context of global modern trends towards constitutionalism, liberalisation and democratisation, the attempt to maintain ‘Schmitt’ as the hegemonic political ideology and as the basis for the exercise of state authority in a matter of emergency powers in the PCLD in Thailand, arguably, cannot conceal the fact that it constitutes the kind of explicit defiance of liberal constitutionalism *formally* entrenched after the 1932 Revolution and reinforced by the 1997 Constitution. ‘Schmitt in Kelsen’ deduced from the Thai experience therefore theoretically challenges Schmitt’s original thesis which confines the role of a positive law to defining who is the sovereign and strives to prioritise ‘factual reality’ (decisionism and a concrete order) over ‘normativism’ in the matter of emergency powers. It instead *shifts* the focus from his *a priori* premise that the sovereign is a person who decides on the PCLD and derives his authority from the ultimate concrete order or the state, to the *a posteriori* alternative: *What institutional technique facilitates sovereign authority successfully to remain legitimate and hegemonic given irresistible trends towards democratisation and liberalisation?*

Obviously in Thailand, written constitutions and the politicisation of the Constitutional Court have become important tools for providing sovereign authority with legal-technical

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<sup>493</sup> David Dyzenhaus, ‘Now the Machine Runs Itself: Carl Schmitt on Hobbes and Kelsen’ (1994) 16 Cardozo L. Rev 1, p 10.

<sup>494</sup> Schmitt, *Political Theology*, p 12.

legitimacy. In other words, the ‘shift’ to which reference has been made indicates that ‘Schmitt in Kelsen’ concerns the growing need for Schmitt to resort to Kelsen’s technique of building constitutionality/legality. I argue that the Thai experience offers four main ways that ‘legality’ theoretically institutionalises sovereign authority: *stabilisation*, *condemnation*, *rationalisation* and *insulation*.

Firstly, rather than seeking permanent rule through coup decrees, the Thai royalist-conservative elites have come to recognise the importance of re-making a new interim constitution after a successful coup, especially since 1958. The formalistic concept of constitutionalism which regards a written constitution as the supreme law helps *stabilise* the anti-liberal realist regime by granting the ‘cloak of constitutionality’ to mechanisms such as M-17 or M-44 applied to purge public enemies, in particular, liberal democracy and its supporters.

Furthermore, as indicated, the constitutional understanding observed by Tom Ginsberg makes permanent military rule under the TSD costly, and therefore forces traditional elites to shift from suppressing liberal constitutionalism to co-opting it. However, as most permanent constitutions initiated after coups deliberately restored *weak* parliamentary democracy and therefore coalition government, they simultaneously function as a mechanism for *condemning* the parliamentary regime as the source of political romanticism, thus preserving royal hegemony and the possibility of coups and any subsequent use of emergency powers.

Lastly, written constitutions, interim and permanent, then play a role in *rationalising* such hegemony and *insulate* sovereign authority from the possible charge of overthrowing a liberal-democratic regime. As we have seen, more sophisticated techniques and more cautious constitution-drafting ensure the impunity, hegemony, and re-assertion of the anti-liberal realist model (i.e., *Thai-ness*), in particular, against an ‘afterlife’ impact of the Kelsenian PoA explicitly adopted in 1997.

Besides, where Schmitt criticised the constitutional review of emergency powers in political crises for taking the judiciary into the realm of politics, the implementation of his approach in Thailand is bolstered by the royalist complexion of the Constitutional Court which turns its judges into key players in undermining a public enemy—the building of a fully-fledged liberal democracy—in a more legal and rational manner. In other words, although constitutional provisions are crucial for institutionalising sovereign authority and creating the opportunity for coups, they are merely lifeless texts—the (Schmittian-ised) Constitutional Court plays a vital role in delivering the core and hegemony of the Schmittian model in practice.

Overall, ‘Schmitt in Kelsen’ reveals that the validity of extra-legal emergency powers can no longer be derived exclusively from the juristic realm of decisionism and a concrete order as Schmitt envisaged, but also has to consider more about legality and legitimacy from the normative-liberal standpoint. It therefore involves acknowledging the essence of and accommodating room for the *iron cage* shattering authority within *the iron cage* (legal ‘ought’) itself by resorting to Kelsen’s legal technique which Schmitt originally resisted. Importantly, it should be noted here that I speak of ‘Schmitt in Kelsen’ in terms of what Kelsen implicitly regarded as ‘a defective instance of legal order’ as discussed in Chapter 1. Although sovereign authority is still, *in theory*, unconstitutional from a liberal-democratic point of view, the institutionalisation of authoritarian emergency powers in Thailand exemplifies how the identity thesis is undermined by its own methodology, that is, the technique of constitutionalisation intending to prevent legally unauthorised norms.<sup>495</sup> Through the lens of Kelsen’s legal hierarchy in the PTL, lower-norms which negate the constitutionality of extra-normative emergency powers (a coup, martial law, *Thai-ness* hegemony) are deemed unconstitutional themselves. Meanwhile, the lack of a strong liberal culture also turns the key mechanism for realising the PoA into one for bolstering ‘Schmitt’ in the name of legality.

Having examined how the Schmittian model struggles to reassert its hegemony in an increasingly sturdy liberal state and society, what I need to examine next is how liberal standards against the country’s strong authoritarian culture might be advocated, institutionalised, and defended. In Chapter 3, I indicated two ways that facilitate the liberalisation of emergency powers: (a) from the above with the support from the monarchy; and (b) from below through political struggles. Below, I theorise Kelsen’s and Schmitt’s approaches to law and politics in the light of this analysis.

### ***3.2 ‘Kelsen in Schmitt’: reconsidering Kelsen’s post-foundational conception of normativity***

The demands for liberal constitutionalism during emergencies against Thailand’s authoritarian tradition, implicitly, if not expressly, a Schmittian-type idea, suggest that we should first revisit the basis of Kelsen’s PoA. As already indicated, Kelsen built his thesis on emergency powers by combining his democratic political theory with his idea of institution *qua* a specialised instrument, that is, the identity thesis associated with the concept of *grundnorm*. As the transcendental condition which constitutes the ultimate *a priori* point of

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<sup>495</sup> H.P. Lee, ‘Constitutionalised emergency powers: a plague on Asian constitutionalism?’ in Ramraj and Thiruvengadam (ed), *Emergency Powers*, p 398.

legal imputation, the grundnorm functions to deny, in particular, legal realism which fuses normativism with concrete factuality, thus ensuring that legal norms are ‘specific kinds of cognition’ which govern their own creation within an objective, closed, self-referential system.<sup>496</sup> However, the sharp distinction between law and politics and the rejection of the constituent power underlying Kelsen’s PTL simultaneously restricts the realisation of the PoA based on the grundnorm. Recalling his comment on the *Preussenschlag* decision, to realise his PoA, Kelsen had to *assume* the existence of ‘technical efficiency’, notably the full-time, impartial, and professional Constitutional Court with the authority to quash unconstitutional emergency powers, and to *presuppose* that all branches of government strongly commit to the identity thesis and democratic constitutional values in practice. Given these assumptions, the grundnorm theoretically ties the PoA to *the post-foundational conception of normativity* (‘PFCN’).<sup>497</sup> In effect, this approach is more probable in, and has to *assume*, an already entrenched liberal democracy.

Below, I first conclude how the aspiration for the PoA is *internally* marginalised by the Schmittian approach. Then, I show that the Thai experience simultaneously reflects contending demands for liberalism both as the state’s fundamental value (‘the norm’) and as the basis for any use of emergency powers from the political sphere (the sphere of validity) *external* to the self-referential legal system, which help propel Kelsen’s project—something Kelsen did not comprehensively speak of. Given the tension between the anti-liberal realist tradition and the effort to make emergency powers accountable to liberal democratic standards, in Thailand ‘Kelsen in Schmitt’ ultimately reveals the narrower discrepancy between legal ‘ought’ and concrete factuality (‘is’) conceived as both problem and prospect.

### ***3.2.1 Schmittian-ising Kelsen: from Grundnorm to Schmitt?***

Against Kelsen’s assumptions, the Thai experience explicitly reveals the absence of a strong commitment to democratic constitutional values which, in turn, mirrors three ways that the Kelsenian model of constitutional emergencies is marginalised by its Schmittian alternative. ‘Schmitt in Kelsen’ exemplifies the first of these. Where Kelsen originally sought to realise liberal constitutionalism through the state system, the instance of ‘Schmitt in Kelsen’, in particular, the politicisation of the judiciary, outwardly subordinates the operation of the Kelsenian model to serve the Schmittian alternative.

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<sup>496</sup> Kelsen, *PTL*, p 202.

<sup>497</sup> Invernizzi Accetti, ‘The temporality of normativity: Hans Kelsen’s overcoming of the problem of the foundation for legal validity’ (2016) 42 PSC 25, p 30.

Apart from ‘Schmitt in Kelsen’, the Kelsenian project in Thailand is also undermined by the problem of *a law deficit*. Thai emergency legislation normally contains provisions contravening human rights norms which grant excessively broad and deferential emergency powers to the military and the executive. Put theoretically, given the absence of a strong liberal culture, a positive law, or more precisely, Kelsen’s preferred technique of constitutionality/legality building, is exploited to pave the way for what Dyzenhaus calls *the internal realist alternative* which grants ‘a veneer of legality’ to any use of emergency powers by political elites.<sup>498</sup> This scenario, in turn, exposes normativism, or more specifically, Kelsen’s approach, to Schmitt’s critique that it overlooks the reality of ‘a spurious mixture of normativism and decisionism’, that is, the reality that law is applied by people’s decisions to serve their interests.<sup>499</sup>

In parallel to the above problem of a law deficit, the Thai experience simultaneously reflects the tendency to turn the rhetoric of liberal constitutionalism into a weapon for wresting control over emergency powers from traditional elites. The 1933 Act enacted by *the People’s Party* and the reason behind the promulgation of the 2005 Decree by Thaksin provide proof. This scenario parallels what Loewenstein, who considered Schmitt’s thesis to be fascist and turned it against itself by urging liberal democracies to view the latter and their supporters as *enemies* of democracy, calls ‘*militant democracy*’.<sup>500</sup> In practice, this theory is subject to different shades of interpretation. Its mild reading suggests that the liberal democratic order needs to embrace Schmitt’s denial of ‘Kelsenian relativism and neutrality’ which permits all parties, including extremists holding ideologies inimical to the state’s survival, to participate equally in politics.<sup>501</sup> It argues instead that, although the application of this concept can lead to the denial of ‘equal chance’ such as by banning political extremists through emergency powers, the exercise of this authority still needs to uphold liberal and constitutional standards, notably the commitment to basic rights and liberty.<sup>502</sup> Nevertheless, the Thai case reflects the radical interpretation of militant democracy which asserts that ‘formalism of the rule of law’ and ‘democratic fundamentalism’ might possibly be set aside during public emergencies as the task of defending liberal democracy requires ‘every possible effort [to] be made ... even at the risk

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<sup>498</sup> Dyzenhaus, ‘The compulsion’, pp 40, 56.

<sup>499</sup> Croce, ‘Legal institutionalism’, p 44.

<sup>500</sup> Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, II’ (1937) 31 Am. Political Sci. Rev 638, p 644.

<sup>501</sup> Benjamin Schupmann, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (OUP 2017), pp 218.

<sup>502</sup> Ibid, pp 215-219.

and cost of violating fundamental principles.’<sup>503</sup> This ironically leads to the enactment of authoritarian emergency laws by governments claiming to champion liberal democracy, which is therefore equivalent to endorsing the flip side of Schmitt’s anti-liberal CoP. In effect, while *militant democracy* in principle protects constitutional democracy, its radical interpretation paradoxically succeeds in undermining commitments to liberal constitutionalism in times of political crises themselves.

Notwithstanding the absence of the aforesaid presumptions hindering the intra-systematic realisation of the PoA, in Thailand, the rhetoric of liberal constitutionalism has obviously become *an undeniable contending force*. The political struggle for liberal legality during the 1992 Black May incident galvanised highly vocal demands for political reforms from civil society and even among many royalist-conservative elites aware of the ‘political cost’ of another coup and martial law, resulting in the 1997 Constitution expressly adopting Kelsen’s PoA, which continues to strengthen contending liberal demands against extra-normative emergency powers. Thus, rather than speaking of the PTL *qua* a theory of legal science which suffers the problems of ‘empty proceduralism’ and ‘anything-goes relativism’, as Schmitt and Dyzenhaus observe, or of the grundnorm *qua* the *transcendental* condition for the effective PoA as Kelsen did, liberal demands in Thailand shift our attention to the *developmental* phase of the project against the authoritarian tradition Kelsen built through the PTL and his theory of liberal democracy in the ‘real-world’ political arena.

Here, I must recall Schmitt’s criticism of Kelsen’s grundnorm as the ultimate source of the misinterpretation of the relationship between legal validity and factual reality. For Schmitt, as this norm is merely presupposed in order to contain human interaction within the impersonal legal system, it overlooks a political condition which facilitates a commitment to liberal legality. From my above assessment, in Thailand, competing demands to subject emergency powers in the PCLD to liberal constitutionalism against the dominant Schmittian view require this problem to be examined. It is therefore beneficial to use Schmitt’s theories of law and politics, which insist on the pervasiveness of politics in every sphere of human life, to address the deficit of the Kelsenian PFCN and even to apply the key elements of his theory to support implementing the Kelsenian project.

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<sup>503</sup> Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I (1937) 31 Am. Political Sci. Rev 417, pp 424, 432.



### 3.2.2 Outside legal 'ought': Schmitt facilitating Kelsen?

Based on Chapter 3, the Thai PCLD indicates two possibilities of how 'Schmitt' might facilitate 'Kelsen'. Recalling Pornsakol's argument on the role of the monarchy in pushing forward legality during the PCLD and the importance of political struggle, royal hegemony in Thailand suggests applying Schmitt's *sovereignty thesis* to implement Kelsen, while mass struggles concern the same role for the concept of *political friends*.

#### 3.2.2.1 The sovereignty-based solution: 'outside' but still 'internal/static'

Pornsakol's argument tacitly shares Andreas Kalyvas's reinterpretation of the relation between Kelsen and Schmitt. To Kalyvas, the PTL focuses on human-made positive norms, authorised by higher authorising ones.<sup>504</sup> Accordingly, Kalyvas shares with Schmitt the view that Kelsen's legal theory reduces 'the validity of a legal norm' to the legitimacy of legality, thus, in turn, preventing Kelsen himself from accounting for the origin of liberal constitutionalism he aspired.<sup>505</sup> By prioritising 'democratic substance'—the will of the people—over 'formal legalism', Schmitt's theory can be re-interpreted as a reminder for public officials in a democratic society, that state authority, tacitly including emergency authority, is valid because it is delegated from 'those directly affected by it', namely the sovereign people.<sup>506</sup> Put simply, Kalyvas's synthetic reading of Kelsen's and Schmitt's theories seeks to add 'the source of legitimacy', including his position on emergency powers, to the former by relying on the latter, and ultimately to make both compatible with the modern trends in liberal democratic theory necessary for building a liberal democratic constitutional order.

The role of the Thai monarchy during the PCLD assessed by Pornsakol supports Kalyvas's argument. Their syncretic reading leads to the conclusion that given the royal interventions in the political crises of 1973 and 1992, the Thai experience implicitly exemplifies how sovereign authority exercised in the name of the people can provide an internal check on emergency powers by deciding that emergency powers the sovereign previously sanctioned are incompatible with liberal-democratic standards and by facilitating the post-crisis restoration of liberal constitutionalism. Let's call this 'the sovereignty-based solution'. Nevertheless, this outcome requires rejecting Schmitt's anti-liberal stance and presuming a shared political belief between the sovereign and the people and the dominance of

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<sup>504</sup> Andreas Kalyvas, 'The basic norm and democracy in Hans Kelsen's legal and political theory' (2006) 32 *Philosophy & Social Criticism* 573, p 575.

<sup>505</sup> Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (CUP 2009), pp 101, 107.

<sup>506</sup> *Ibid*, p 115.

the ‘liberal ideal’ in society. As I argued in the previous chapter, the ideological rift between (a) the attempt to preserve the hegemonic ‘Schmittian’ tradition of *Thai-ness* through a coup supported by the Yellow faction and (b) the contesting demands for liberal democracy and constitutionalism, which Pornsakol fails to assess, however compromises this solution. Above all, this failure suggests revisiting the theoretical basis for this sovereignty-based solution.

Theoretically, according to the sovereignty-based solution, Kelsen’s inability to account for the democratic origins of the PoA is rooted in his endorsement of the neo-Kantian transcendental philosophy to construct the grundnorm as the embodiment of the cognition of legal norms through legal imputation.<sup>507</sup> This solution then shifts the main focus from the problem of ‘how things can be known’ to ‘what exists in reality’, that is, from the grundnorm as a presupposition to the sovereign as ‘the ontological foundation for the validity of legal norms’.<sup>508</sup> However, while the sovereignty-based solution seeks to resolve the attempt to contain politics within the self-regulated legal system by going ‘outside’ the legal ‘*ought*’, it is static and internal in the sense that it still resorts to politics through the self-referential political system. Meanwhile, by hinging upon Schmitt’s original idea that the sovereign embodies the people, this solution, though replacing Kelsen’s transcendental presupposition with Schmitt’s realist-ontological alternative, is trapped within the remnant of the transcendental presupposition inherent in Schmitt’s CoP. This is because the sovereignty-based solution still has to presuppose the friendly quality or the shared political belief between the sovereign and the people—something which has become increasingly absent in Thai colour-coded politics due to the rise of the pro-democracy masses. However, this sovereign-based solution itself struggles to address this deficiency since it makes the idea of an active citizenry absent by rendering ‘the people’ conceived as a collective agency ‘synonymous to a substantive equality between the members of a polity.’<sup>509</sup>

Given that liberal demands have become contending forces in Thailand, we should think of an alternative to proceeding with the Kelsenian project through the system and its logico-transcendental presupposition for cognition. The political struggle for legality during violent emergencies in Thailand suggests that we should conceive the important role of an active citizenry in this matter.

### 3.2.2.2 *Political friends: ‘outside’ and ‘external/dynamic’*

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<sup>507</sup> Ibid, p 101.

<sup>508</sup> Accetti, ‘The temporality of normativity’, p 26.

<sup>509</sup> Hans Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007), p 14.

As previously observed, the Thai case exemplifies how legal mobilisation, notably in 1992, helps drive forward the fuller adoption of the Kelsenian project in 1997. In contrast to Kelsen who focused largely on legal-technical and institutional conditions for realising the PoA, the *afterlife* of the 1997 Constitution reflects the symbolic impact of these developments, that is, of inspiring anti-coup sentiment and of bolstering competing demands for liberal-democratic standards for the application of emergency powers in the colour-coded crises. Contrary to Harding's and Ramraj's arguments relating to political struggles to liberalise emergency powers, the Thai example also suggests that supporting this project is not beneficial merely for pro-democracy liberals. The Yellow faction might also 'demand' putting emergency powers under legal constraints, notably when they lose their firm grip power, and their *political interest* is threatened. In effect, political struggles for liberalism based on 'self-interest' propel the liberal rhetoric to challenge the politics of exclusion within the political sphere, and also to increase the 'costs and risks' of extra-normative and harsh emergency powers, notably the imposition of military coups and the use of martial law powers. Accordingly, I argue that the Thai experience indicates how Schmitt's notion of 'political friends' might be read to process competing demands for a Kelsenian liberalisation of emergency powers.

Throughout this thesis, I have discussed two ways in which the term 'political friends' is related to emergency powers in the PCLD. The first applies to justify emergency powers invoked to exclude public enemies by reference to high-priority values of the state. This position is apparent in Schmitt's *Political Theology* and other writings supporting the expansive reading of Article 48 of the Weimar Constitution, and in contributions by scholars such as Dyzenhaus and Gross who assess Schmitt from this angle. Lowenstein and Schupmann also embrace this position when speaking of *militant democracy*. The second way the term 'political friends' is used concerns sovereignty-based solution referred to above and derived from the syncretic reading of Pornsakol's and Kalyvas's arguments. It gives less attention to 'enemies', but still emphasises 'the friendship' between the sovereign and the people.

Notwithstanding their differences, both positions still link 'political friends' to 'state authority'. The Thai experience, I argue, suggests a third reading of 'political friends' which breaks this linkage, and which also challenges Harding's and Ramraj's arguments concerning political struggles by 'liberals' necessary for pushing the Kelsenian project forward. Schmitt's book, *The Concept of the Political*, permits this reading as he approached the term 'friends' in general and then assessed its relation to 'enemies' and 'the state'. In the process, two types of political enemies derived from Schmitt's thesis, shed light on the term 'political friends'. A 'friend' in the *institutional* sense contrasts 'political friends' with

‘enemies’, thus regarding the status of the state in terms of the unity of friends.<sup>510</sup> By contrast, a ‘friend’ in the *concrete* sense refers to the existence of a competing collective entity in general.<sup>511</sup>

As political struggles advanced by ‘self-interested preservation’ are vital for liberalising emergency powers in the PCLD in Thailand, this experience suggests how the second sense of ‘political friendship’ helps fill in the gap left by Kelsen’s PFCN. This solution to the deficit entailed by the transcendental method of Kelsen’s PTL is epistemic as ‘friendship’ in the concrete sense offers the cognitive criterion and sense of the collectivity of individuals with a shared concrete project.<sup>512</sup> It however deviates from the closed, self-referential political system by reminding us of the essence of ‘the political arena’—a battlefield for competing interests, values, and particular political agendas. For Schmitt, mass media, popular education, the network of professionals and scholars, and party assemblies are vital means for shaping collective identity.<sup>513</sup>

Based on the analysis in Chapter 1, the term ‘political friends’ is *political*, in that, it is *not* concerned with the real/ideal motive (value-judgment ‘*ought*’), i.e., why particular individuals commit themselves to those values and principles, including liberal values. A common project is only something important for *empirically* constructing the *existential* collectivity (concrete factuality ‘*is*’). Thus, *political friends of Kelsen* can then be defined as the collectivity of individual members similarly *seeing* the *benefits* of a commitment to the rule-bound legality and other liberal standards for the invocation of emergency powers by state officials, regardless of their intrinsic reason(s) for doing so. This term, given its political nature, is then grounded in ‘self-interest’ which exists in the cognition ‘*is*’ dimension rather than in its unreason/value ‘*ought*’ counterpart which concerns the genuine *belief* in the rule of law which Harding and Ramraj consider important for mobilising rights and freedoms in security matters. Meanwhile, since ‘friendship’ here is not tied to the state system/concrete order, it is not equivalent to Schmitt’s existential concept of the constitution—a fundamental criterion which determines the homogeneity within the state—but is ‘a condition to be established’, in particular, through the process of legal mobilisation.<sup>514</sup> By pushing this commitment in a political struggle forward, such values are then increasingly imprinted upon the political

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<sup>510</sup> Schmitt, *The CoP*, p 47.

<sup>511</sup> Ibid, pp 28-30.

<sup>512</sup> Kalyvas, *Democracy*, p 122; Seitzer, ‘Carl Schmitt’, p 218.

<sup>513</sup> Schmitt, *The Crisis*, p 29.

<sup>514</sup> Cf Mariano Croce, ‘The enemy as the unthinkable: a concretist reading of Carl Schmitt’s conception of the political’ (2017) 43 HEI 1016, p 1023.

arena—a concrete order. This political struggle inevitably calls for an opposition or what Schmitt tacitly regarded as ‘*institutional enemy*’. Later in this chapter, I will assess its effect on Schmitt’s three types of juristic thought.

### ***3.3 The paradoxical friction: reconsidering the relationship between ‘is’ and ‘ought’ and between ‘law’ and ‘politics’ in the Kelsen-Schmitt debate***

From the above sub-sections, the general ideas of the pragmatic hybrid can be identified. This alternative normative perspective, I argue, primarily acknowledges that Kelsen’s and Schmitt’s original theses cannot be fully implemented based on the original Weberian straight-line. Instead, it generally reveals the pull of Kelsen upon Schmitt and the pull of Schmitt upon Kelsen, and therefore theoretically suggests considering the relation between Kelsen and Schmitt in terms of what I call *the paradoxical friction*, that is, the friction between (a) the growing need to separate legal ‘*ought*’ from ‘*is*’ to ensure the prevalence of anti-liberal realism over increasingly sturdy liberal forces and (b) their connection facilitated by the political struggles for the PoA against anti-liberal realism and its institutionalisation based on ‘self-interested preservation’. Here, three theoretical lessons are suggested.

Firstly, the paradoxical friction redraws the relationship between factuality ‘*is*’ and legal ‘*ought*’ internal to Kelsen’s and Schmitt’s models. On the one hand, ‘Schmitt in Kelsen’, though accommodating a greater space for legal ‘*ought*’, paradoxically marginalises the realisation of the EoR and therefore the PoA. Yet, ‘Kelsen in Schmitt’, while mobilising the essence of liberal democracy and constitutionalism into the real-world political space, separates it from the category of legal imputation under the PTL. In this light, the pragmatic hybrid therefore invites us to revisit how liberal constitutionalism functions beyond the sphere of normativism. I will more comprehensively explain this point in Section 9.

Following the first observation, it is therefore apparent that the pragmatic hybrid suggests the approach of reading the Kelsen-Schmitt debate alternative to the traditional ‘contrasting’ approach and the ‘supplementary’ alternative. On the one hand, the ‘contrasting’ approach reads Kelsen and Schmitt as two jurists and representatives of raw conflicting interests who adopted ‘two opposing epistemological approaches to the law/politics’.<sup>515</sup> Against this approach, given the paradoxical friction associated with it, the pragmatic hybrid reflects the attempt to assert the legitimacy of the Kelsenian and Schmittian models based on the method internal to their opposing model. In parallel, ‘Schmitt in Kelsen’ and ‘Kelsen in

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<sup>515</sup> Cesare Pinelli, ‘The Kelsen/Schmitt Controversy and the Evolving Relations between Constitutional and International’ (2010) 23 *Ration Juris* 493, p 494.

Schmitt' then seemingly advocate an alternative way of reading Kelsen and Schmitt, namely the 'supplementary' approach which regards them as 'correctives' to each other's deficiencies. However, against such approach, the interface between the two instances turns Kelsen and Schmitt into each other's opposite. Ultimately, the pragmatic hybrid shuttles back and forth between the two approaches. It therefore invites us to consider the paradoxical friction in terms of the gravitational relation between 'reinforcement' and 'subversion' between the two constitutional emergency models.

Thirdly, in the broadest picture, it follows from the second observation that the pragmatic hybrid challenges the relation between law and politics in the Kelsen-Schmitt debate. As Přibáň concludes, Kelsen who proposed the PTL *qua* the PFCN asserted that 'law is not politics', while Schmitt who gave primacy to concrete factuality over normativism, advocated that 'politics is not law [*qua* normativism]'.<sup>516</sup> The pragmatic hybrid resists placing both arguments at the opposite ends of the spectrum, and instead emphasises their gravitational connection. I argue that the general ideas of the pragmatic hybrid raise three theoretical questions. By answering them, its full substantive details can be identified.

### ***3.4 Key theoretical questions associated with the pragmatic hybrid: a move to the external perspective of the constitutional emergency model***

By exposing the interface between 'Schmitt in Kelsen' and 'Kelsen in Schmitt' rendering the paradoxical friction, the pragmatic hybrid invites us to revisit the *external* perspective of the constitutional emergency model. The three theoretical questions associated with it suggest reconsidering the key elements of the Kelsenian and Schmittian models, namely the norm-exception dichotomy and the competing conceptions of authority to invoke emergency powers and its accountability in relation to the AoH.

I answer the first two in the light of the key elements of this PhD thesis—competing value-judgments fundamental to or threatening a social order ('*ought*') and state authority to secure a social order ('*is*'). With respect to the value '*ought*' dimension, the first question is related to how the gravitational pull between Kelsen and Schmitt affects the conflicting views on what should count as the norm and the exception, in particular, a CoI and the AoH in the PCLD. By contrast, the second question is premised upon the gravitational pull between normativism on the one hand and decisionism and a concrete-order framework on the other, thus involving how the roles of the SoE and its relation with the CoP, the PTL/the PoA, and

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<sup>516</sup> Přibáň, 'Self-Reference', p 326.

Schmitt's three juristic thoughts should be reconceived and redrawn. I examine the first question in Section 4 and the second question in Sections 5 to 7.

Lastly, the third question concerns how the Weberian straight-line, including the notion of 'interest', and the function of liberalism, including the gravitational pull between the legitimacy of legality and the legitimacy of law, underlying the Kelsenian and Schmittian models should be redrawn. I seek to answer these questions in Section 9 by taking into account the findings in Section 4 to 7 and also by examining in Section 8 the deficiencies of the suggested modifications for Kelsen and Schmitt based on the 'liberal-type' Weberian straight-line (i.e., the strong reading of authority and the communicative-based authority).

#### **4. The norm-exception dichotomy and the AoH: the politics of defective co-optation**

As we have seen, the norm-exception dichotomy associated with emergency powers in the PCLD not only concerns 'the exception' *qua* the suspension of normativism, but is also related to what counts as the state's fundamental value and its threats. Based on the pragmatic hybrid, I now reconsider the competing conceptions of such dichotomy rendered by the interface between 'Schmitt in Kelsen' and 'Kelsen in Schmitt'. The former connotes how the 'waning but still dominant' anti-liberal ideology prevails as 'the norm' over 'sturdier but still inferior' liberalism, while the latter concerns how the contesting notion of liberalism seemingly operates as 'the norm' in the presence of Schmitt's dominant anti-liberal ideology. I argue that the various dimensions of 'Schmitt in Kelsen' and 'Kelsen in Schmitt' provide the general picture of the relation between their respective preferred conceptions of 'the norm' and the problem of a CoI/the AoH in the light of what I call 'the PDC' and its paradox.

On the one hand, the Thai experience reveals how political struggles to assert liberalism as the norm makes permanent military rule costly, leading to the shift from repression to co-opting liberal democracy. However, as already indicated, a written constitution and the Constitutional Court play a role in preserving the traditional ideology, network, and system which intentionally create, yet, simultaneously condemn electoral politics as corrupt and factional. In consequence, liberal political challenges in Thailand are unable to ensure that the project of building liberalism as 'the norm' goes all the way. Meanwhile, as the Yellow faction can no longer maintain an absolute grip on power, the Constitutional Court was also prepared to embrace the PoA as the norm to protect the mobilisation of anti-liberal ideologies by the PAD/PDRC from the use of emergency powers by 'public enemies'. In this context, it can then be said that liberalism is co-opted by its anti-liberal realist opposite not because it is considered useful in reconciling the AoH as Kelsen envisaged, but because it facilitates the exception by breeding political romanticism and subsequently the AoH threatening homogeneity which, in

turn, justifies supervision by the sovereign's emergency authority and the mobilisation and institutionalisation of anti-liberal homogeneous ideologies. However, such co-optation, in turn, creates a paradox. Given the declining legitimacy of *Thai-ness* hegemony, Prayuth's current military regime has to rely more on harsh and undemocratic emergency measures, notably the NCPO leader order no.3/2558 (2015) issued under M-44 mentioned in Chapter 3, targeting anti-coup/pro-democracy movements to maintain 'the climate of censorship and intimidation', yet, counter-productively stirring up greater anti-conservative sentiment and social polarisation.<sup>517</sup> Put theoretically, the Schmittian realist model may therefore risk its already declining legitimacy to prevail over liberalism as the norm by creating the exception from both Kelsenian and Schmittian perspectives, that is, by increasingly entrenching authoritarian rule and by exacerbating the lack of consensus on what constitutes political homogeneity/the true meaning of the constitution through harsh emergency powers respectively. However, this lack of consensus is paradoxical, in that, the more those emergency powers become more authoritarian and breed the AoH, the more such AoH paradoxically turns politics into the realm of 'endless discussion'—a kind of political romanticism—which, in turn, justifies an 'increasingly self-destructive' resort to the Schmittian model and its institutionalisation.

Overall, having been concerned also with what constitutes the state's fundamental value, the PDC does not speak of the norm-exception dichotomy *qua* a necessary means for ensuring the exceptional and temporal nature of emergency powers.<sup>518</sup> But, this does not mean that it aims to label this dichotomy as a chimerical rhetoric which leaves room for the Schmittian interpretation of 'the exception' *qua* the suspension of legal norms.<sup>519</sup> Rather, the PDC asserts the gravitational pull between the competing Kelsenian and Schmittian conceptions of the norm-exception dichotomy in the PCLD. In this context, both liberalism and authoritarianism cannot *absolutely* and *genuinely* prevail over each other as the norm because they are gravitationally pulled by their opposite, yet, they might operate *relatively* as the norm because they precipitate the exception. Since we cannot expect the *full* implementation of the political ideology/regime based on either the politics of reconciliation or the politics of exclusion in the context of the pragmatic hybrid, the two competing conceptions of 'the norm' and 'the exception' should at best be conceived in terms of ongoing legal, political, and social struggles. Nevertheless, they indicate a greater cost incurred for 'Schmitt' as authoritarianism

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<sup>517</sup> Ferrara, *Political Development*, pp 280, 290; Paul Chambers, 'In the Land of Democratic Rollback: Military Authoritarianism and Monarchical Primacy in Thailand' in Brendan Howe (ed), *National Security, Statecentricity, and Governance in East Asia* (Palgrave Macmillan 2018), p 46.

<sup>518</sup> Gross and Ní Aoláin, *Law*, pp 172-173.

<sup>519</sup> Lazar, *States of Emergency*, p 4.



precipitates the exception from both angles of Kelsen and Schmitt, while liberalism has become a more acceptable type of ‘the norm’ and standard for emergency powers of which *both* parties to the PCLD are aware.

The above gravitational pull provides a backbone for understanding Kelsen’s and Schmitt’s competing conceptions of legitimate emergency powers in the following three sections. Below, I examine the key element internal to the Kelsen-Schmitt debate on the conception of authority to invoke emergency powers—the SoE—in the light of the absence of consensus on whether Kelsen or Schmitt offers the best constitutional emergency model.

## **5. ‘Kelsen against Schmitt’ vs Agamben’s concept of the SoE: an overview**

As I previously discussed, Kelsen and Schmitt disagreed over whether the doctrine of legal imputation should be suspended when emergency powers are applied during the PCLD. Here, I discuss the overview of their debate under the umbrella of the most prominent contemporary work on the concept of the SoE by Giorgio Agamben.

### ***5.1 Agamben on Kelsen and Schmitt***

For Schmitt, the SoE, I already discussed, is linked to the threat posed by the PCLD to ‘a fundamental value’ and therefore to the survival of the state, thus calling for the use of emergency powers involving sovereign authority to suspend normativism to suppress it. But, although the sovereign stands outside and holds emergency powers to transcend normativism, its authority is still derived from the juridical framework, that is, from a concrete order. This position is rigorously rejected by Kelsen. However, by recognising that legally-authorised emergency powers contain a penumbra of uncertainty, the PTL tacitly admits a connection between the SoE and the legal order. Both stances are however criticised by Agamben who examines the SoE *qua* ‘the problem of authoritarianism’ in his book—*State of Exception*.<sup>520</sup> Here, my main focus is not on what Agamben counts as ‘bloated’ emergency powers, but on how he redefines the SoE, using it as a springboard for synthesising Kelsen and Schmitt.<sup>521</sup>

On the one hand, Agamben regards Kelsen’s approach (though not by name) as the attempt to regulate the SoE through the law, and praises Schmitt for his effort to theorise the SoE, notably by acknowledging the suspension of normativism, the fusion of the legislative with executive power, and the tension between the normative force of law and its realisation.<sup>522</sup> Yet, against both Kelsen and Schmitt, in Agamben’s view, the SoE is neither *lex specialis* nor

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<sup>520</sup> Daniel McLoughlin, ‘Giorgio Agamben on Security, Government and the Crisis of Law’ (2012) 21 GLR 680, p 681.

<sup>521</sup> Cf Prabhat, *Unleashing the Force of Law*, pp 47-49

<sup>522</sup> Agamben, *SoE*, pp 32, 36-39.

dictatorship in the form of sovereign authority bridging the SoE with the juridical order.<sup>523</sup> Although he does not mention a concrete order *qua* the ultimate juridical framework for Schmitt, the same conclusion would be reached if he did. Ultimately, for Agamben, Kelsen and Schmitt were wrong to annex the SoE to the juridical order.<sup>524</sup> According to Agamben, the SoE precipitates ‘a zone of anomie’ (‘an juridical void’ or ‘a space devoid of law’)—a zone whereby ‘all legal determinations ... are deactivated.’<sup>525</sup> He worries that emergency powers, such as preventive detention, might be exploited to produce the SoE, thus transforming ‘the juridico-political system ... into a killing machine.’<sup>526</sup> He partially uses Hitler’s abuse of emergency powers to transcend the Weimar Constitution and the Nazi concentration camps as examples. Subjects of emergency powers, stigmatised as ‘public enemies’, fell prey to the SoE, that is, to governmental violence not formally authorised by the law, yet, which deprived them not only of their legal rights protecting them from any abuse of emergency powers, but also of their status as human beings.<sup>527</sup> Put theoretically, the SoE blurs the boundaries between ‘fact’ and ‘law’, that is, (a) between ‘inside’ and ‘outside’ the law since ‘legal categories and the idea of sovereignty have served as a justification for abandoning “enemy bodies” to zones outside strict legality’; and (b) between ‘the normative aspect of the law’ and ‘life’ as ‘the authoritarian-charismatic power springs almost magically from the very person of [the sovereign]’.<sup>528</sup>

## 5.2 ‘Kelsen against Schmitt’ in Thailand in Agambenian perspective: its significance

As the mark of the ‘totalitarian’ turn, the characteristics of the SoE observed by Agamben undermine Kelsen’s PoA, and are more extreme and ambiguous than Schmitt’s version.<sup>529</sup> Thus, while at one end of the spectrum is Kelsen’s theory which seeks to regulate the SoE through the doctrine of legal imputation, and at the other is Agamben’s definition, in between lies Schmitt’s theory which strives to connect decisions made by the sovereign with the juridical order.

Nevertheless, the main focus of Agamben’s theory, as with the Kelsen-Schmitt debate, is largely upon the SoE from the *cognitive* dimension, namely the *apparent* suspension of law

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<sup>523</sup> Ibid, p 50.

<sup>524</sup> Ibid.

<sup>525</sup> Ibid.

<sup>526</sup> Ibid, p 86.

<sup>527</sup> Ibid, p 2.

<sup>528</sup> Ibid, pp 51, 85-86; Vik Kanwar, ‘Review Essay: Giorgio Agamben, State of Exception’ (2006) 4 I•CON 567, p 568.

<sup>529</sup> Bas Schotel, ‘Defending our legal practices: A legal critique of Giorgio Agamben’s state of exception’ (2009) 1 Amsterdam L.F. 113, p 117; Daniel McLoughlin, ‘In Force Without Significance: Kantian Nihilism and Agamben’s Critique of Law’ (2009) 20 Law Critique 245, p 249

*qua* normativism, and upon the problem of authoritarianism and violence it entails. However, unlike Kelsen and Schmitt, it is not specifically concerned with the SoE associated with the PCLD. Its relevance in the light of the pragmatic hybrid in Thailand provides an alternative understanding for the concept of the SoE in this debate and for its relationship with the PTL, the CoP, and Schmitt's three types of juristic thought. Recently, two scholars, Piyabutr and Streckfuss, have applied Agamben's SoE to describe the colour-coded crises. For them, this phenomenon is relevant to Thailand because the Red Shirts, stigmatised as 'un-Thais', are particularly prone to being subject to violence and extra-judicial killings precipitated by emergency powers.<sup>530</sup> However, Piyabutr and Streckfuss also briefly examine the problem of the SoE from the perspective of *cognition*. My synthesis below adds to their arguments concerning how competing liberal values affect the key features of the SoE conceptually.

Below, I assess the SoE from the aspect of 'Schmitt in Kelsen' with it (Section 6) and then of 'Schmitt colliding with Kelsen' driven by 'Kelsen in Schmitt' (Section 7). The former seeks to reconsider the relationship between the SoE, the AoH, and the Kelsenian concept of authority to invoke emergency powers and its accountability, while the latter addresses the SoE in relation to political struggles for liberal legality, the AoH and its effects on Schmitt's three types of juristic thought. In both circumstances, I also apply the Thai experience to reinterpret the roles of the SoE in the Kelsen-Schmitt debate.

## **6. 'Schmitt in Kelsen' in Agambenian perspective: the SoE and the Kelsenian PoA**

As we have seen, 'Schmitt in Kelsen' in Thailand signifies the institutionalisation of emergency powers against more sturdy contending liberal forces, and is related to the politicisation of the Constitutional Court. Agamben however does not comprehensively assess the roles of judges in relation to the SoE, whilst Schmitt resisted the politicisation of the latter. In contemporary works, scholars observe the two main roles of judges on this issue. On the one hand, they can limit the effects of the SoE, notably by reassuring basic rights of individuals subject to emergency powers, such as the rights to non-discrimination and to habeas corpus review.<sup>531</sup> On the other hand, they may be sceptical about judicial deference to the executive

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<sup>530</sup> Streckfuss, 'The End of the Endless Exception?'; ปิยบุตร แสงกนกกุล [Piyabutr Saengkanokkul], “‘สถานะขกเว้น” ในความคิดของ Giorgio Agamben’ [“‘State of Exception” in Giorgio Agamben’s thought’] (2010) 8 Samesky 84, p 91.

<sup>531</sup> David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101 Mich. L. Rev. 2565, p 2593; Dyzenhaus, 'States of Emergency', pp 452-260; Schotel, 'Defending', pp 122-123; Greene, *Permanent States of Emergency*, pp 198-201; Stephen Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's State of Exception' (2006) 17 EJIL 677, pp 686-687.

which, in turn, leads to ‘rubber stamping’ the SoE.<sup>532</sup> However, if the concept of the SoE and these two roles are considered in the context of the pragmatic hybrid in Thailand, the fact that these roles are both gravitationally pulling upon each other is exposed. Below, I strive to examine how these two roles challenge the relationship between Kelsen’s PoA and the SoE. I answer this question again by resorting to the ‘*is-ought*’ distinction.

### ***6.1 The SoE from the cognitive dimension: denying the apparent suspension of normativism?***

From the *cognitive* dimension, the shift from the *apparent* suspension of normativism to the increasing need to institutionalise the Schmittian model significantly challenges Agamben’s and Schmitt’s positions on the SoE, yet, more adversely affects the former given its portrayal of the SoE *qua* the phenomenon in which the juridical order is made insignificant. Despite the eventual coup in 2014, this shift, at least, reflects the declining legitimacy of the aforesaid suspension and the growing importance of legality as an important ground for identifying emergency powers as violations or threats to the purported high-priority value. When deciding on petitions concerning the constitutionality of the PDRC rallies and the use of emergency powers by the Red government between 2013 and 2014, Constitutional Court judges even used the rhetoric of rights and freedoms to protect the protesters from state violence. The Thai context, in short, reflects the gradual shift within the *cognitive* dimension from a juridical void in Agamben’s theory to the juridical order (Kelsen and Schmitt), and then from the sovereign (Schmitt) to the judiciary (Kelsen).

### ***6.2 The SoE from the ideal entities dimension: Kelsen’s concept of authority to invoke emergency powers and its accountability reconsidered***

This section seeks to illustrate the transfer of the SoE from the cognitive sphere to that of ideal entities. Here, four theoretical lessons can be identified. I consider the first two together as they challenge the theoretical basis of the Kelsenian concept of authority to invoke emergency powers and the problem of accountability underlying the realisation of the PoA. The third and fourth lessons, on the other hand, suggest an alternative understanding of the SoE.

As indicated in Chapter 1, Kelsen advocated the importance of normativism as a bulwark against the apparent imposition of the SoE. His concept of public authority requires a

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<sup>532</sup> Bruce Ackerman, ‘The Emergency Constitution’ (2004) 113 Yale Law J. 1029, p 1066; Fiona de Londras and Fergal F. Davis, ‘Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms’ (2010) 30 OJLS 19, pp 24-33; Tamir Moustafa and Tom Ginsburg, ‘Introduction: The Functions of Courts in Authoritarian Politics’ in Tamir Moustafa and Tom Ginsburg (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008), pp 5-6.

belief in a liberal-democratic constitution, and presupposes the autonomous value of legality and the identity thesis. He then sought to realise the PoA by resorting to the doctrine of legal imputation, that is, the use of legal norms to confer meaning upon factuality ‘*is*’, and therefore proposed the idea of accountability based on a legal-democratic constitution functioning as a mechanism for defusing ‘political conflict through the avoidance of sovereign decision and of any irrevocable commitment to a particular understanding of political identity.’<sup>533</sup>

Against Kelsen, the Thai experience primarily suggests that whether the PoA is adopted or jettisoned depends not on the liberal ethos, namely the politics of reconciliation and the principle of legality, but on the CoP, that is, whether they are imposed by/against a public enemy. In situations where emergency powers, especially those under the 2005 Decree, were applied by the Yellow faction against the Red protesters, the Constitutional Court did not hesitate to jettison the PoA and even to transform itself into what Agamben calls ‘a killing machine’, in particular, by endorsing extra-judicial killings such as the UDD crackdown in 2010. The Court was even prepared to create a power vacuum to pave the way for the 2014 coup and martial law powers, adopting *extreme factuality* by strongly prioritising political considerations over, and at the expense of, rule-bound legalism, yet, still exploiting the latter as a cloak. But, by contrast, in 2008 and between 2013 and 2014, it embraced the logic underlying the PoA that the application of such powers itself by the Red government constituted a threat to the state and jeopardised the politics of reconciliation. In this respect, the Court oscillated between *extreme factuality* and another problematic instance of *extreme legality* by citing legal principles without considering theories underpinning them and what happened in practice.

From the latter stance, it follows, second, that the *formal* operation of the PoA is not really subject to ‘the normative priority of legality’s autonomous value’ as Kelsen envisaged, but to the deficiency of liberal legality criticised by Schmitt—because liberalism allows public enemies to capture the state’s emergency mechanism under the guise of ‘legality’. In consequence, its operation is defective because it is prone to transform the rhetoric of constitutionality/legality, rights, liberties, and political compromise into weapons for subverting political enemies, thus undermining the liberal conception of legal and political accountability aspired to by the PoA—the same result as where this project is jettisoned. This

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<sup>533</sup> Gülşen Seven and Lars Vinx, ‘The Hegemonic Preservation Thesis Revisited: The Example of Turkey’ (2017) 9 HJRL 45, p 77; Ramraj, ‘Constitutional Tipping Points’, pp 193-195.

deficiency simultaneously justifies a resort to the logical suspension of ‘legal imputation’ to repress such enemies, thus exposing the third theoretical lesson.

Ostensibly, the oscillating instances of *extreme factuality* and *extreme legality* defectively enables the PoA to break the chain of conditional facts and legal consequence inherent in Kelsen’s doctrine of legal imputation. By rendering the division between ‘questions of fact and questions of law’ meaningless, this break, in effect, echoes the logic of Agamben’s SoE.<sup>534</sup> The Thai experience accordingly mirrors the view that it is more legitimate increasingly to transfer the SoE from the *apparent* suspension of normativism to deal with the PCLD into the *ideal* realm of *legal logic* that governs the effectiveness/ineffectiveness of emergency powers in the PCLD, their institutionalisation, the imposition of pure violence, and the PoA. In other words, where the position of the SoE within the *cognition* perspective connotes a move towards Kelsen, that within the *ideal entities* alternative mirrors a departure from his theory to somewhere between Agamben and Schmitt given that both instances of *extreme factuality* and *extreme legality* reflect Agamben’s logic of legal void, yet, still hinge on the juridical order. Simultaneously, the above transfer suggests that we should not narrowly conceive of the SoE *qua* the suspension of normativism (Schmitt) nor *qua* pure violence and the juridical void against enemies (Agamben). Instead, it suggests considering the SoE more broadly as part of the political elites’ growing effort to legitimise and institutionalise the hegemony of anti-liberal realism. Nevertheless, this alternative understanding has to be considered in tandem with the fourth theoretical lesson.

Fourthly, the Thai experience shows that, if the Red faction pushed its Yellow opponent too far, especially by invoking the 2005 Decree which justified the use of force to resolve the PCLD, it risked its own destruction by provoking greater struggles by the protesters, the AoH, and a counteraction by the ‘Schmittian-ised’ Constitutional Court and the military. As illustrated in Chapters 2 and 3, to avoid such ‘costs and risks’, Yingluck was more meticulous than Samak and Somchai when applying emergency powers. She primarily resorted to the less draconian ISA which does not grant the power to disperse any public gatherings or assemblies to deal with the PDRC in 2013 and 2014. Put theoretically, in the light of the pragmatic hybrid bred by the greater collision between liberal and right-wing conservative forces, the attempt to imprint the SoE upon the Kelsenian concepts of authority and accountability paradoxically renders a commitment to the PoA more vital especially on the part of a faction labelled as ‘public enemies’.

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<sup>534</sup> Giorgio Agamben, *The Omnibus Homo Sacer* (SUP 2017), p 142.

Where this section examines how ‘Schmitt in Kelsen’ affects the contours of the SoE, I next turn to the relationship between the effort to implement the SoE through sovereign authority/its institutionalisation and political struggles for ‘Kelsen’ (Kelsen in Schmitt).

### **7. ‘Kelsen in Schmitt’ against the SoE in Agambenian perspective: the ultimate undecidability and the three types of juristic thought**

In this section, I ask: *How do political struggles for liberal legality in times of the PCLD affect (a) the implementation/institutionalisation of the Schmittian model, and more specifically, the connection between normativism, decisionism, and the concrete-order framework in Schmitt’s legal theory?* The answer to this question challenges Schmitt’s concept of authority to invoke emergency powers and its accountability, and reveals another alternative understanding of the SoE.

As we have seen, for Schmitt, the legitimate imposition of emergency powers in the PCLD depends on the unity of the elements of decisionism and a concrete order in the three types of juristic thoughts and their primacy over that of normativism. Meanwhile, his concept of the accountability of emergency powers advocates the existential concept of the constitution that glorifies state authority/sovereignty to impose the SoE *qua* the suspension of normativism to exclude ‘enemies’ to subdue the AoH associated with such powers rather than to hold them normatively accountable.<sup>535</sup>

However, as exemplified by the rise of the Red Shirts against the 2006 and 2014 coups and martial law powers, the greater the gravitational pull between Kelsen subject to Schmitt (Schmitt in Kelsen) and Schmitt struggling with mobilisation for liberal legality (Kelsen in Schmitt), the greater the asymmetry between an intra-systemic interest and a CoI/the AoH is exacerbated, blurring the boundaries between what is inside and outside the law which, in effect, exposes the rift between the three juristic dimensions in his theory of law. This can be explained through the authority ‘*is*’ and the value ‘*ought*’ distinction.

With respect to the authority ‘*is*’ perspective, the collision between the ‘Schmittian’ effort to impose the SoE and political struggles for ‘Kelsen’ blurs the relationship between (a) ‘law in place’ which signifies the formal status of law/its state of existence and (b) ‘its application’ or its concrete realisation.<sup>536</sup> From the Schmittian standpoint of the imposition of the SoE (i.e., the ‘Yellow’ perspective), law still remains ‘in place’ in the form of decisions based on a concrete order which transcends the ‘application’ of normativism. By contrast, from

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<sup>535</sup> Panu Minkkinen, ‘Political constitutionalism versus political constitutional theory: Law, power, and politics’ (2013) 11 I•CON 585, pp 585, 599.

<sup>536</sup> Cf Agamben, *SoE*, p 36.

that of the PTL (i.e., the ‘Red’ perspective), as normativism is suspended, law is not formally ‘in place’. However, political struggles for liberal legality during political crises in Thailand reflect that law *qua* normativism is *informally* ‘applied’ at least as a minimal normative parameter for politically gauging the SoE and Schmitt’s anti-liberal concept of law *qua* decisionism and a concrete order with liberal constitutionalism.<sup>537</sup>

Moving onto the ‘*ought*’ perspective, the issue above exposes the conflict between what counts/is valued as ‘order’ and ‘violence outside the law’. From the ‘suspension’ standpoint, the imposition of the SoE is essential for ensuring a social order *qua* the homogeneity of the *demos*. By contrast, from the Kelsenian mobilisation alternative, the suspension of law, including the attempt to break the chain of legal imputation, is illegal, and constitutes or possibly paves the way for anarchy.<sup>538</sup>

From the above, we can see on the one hand that ‘Kelsen in Schmitt’ challenges Schmitt’s concept of emergency authority by creating the rupture between normativism on the one hand and decisionism and a concrete order on the other by mobilising what can be described as ‘normativism, not in place, but informally applied with significance’. Here, the logic of Agamben’s SoE—the *ultimate undecidability* between the juridical order and a juridical void—is subsequently propelled into the centre of gravitation of its interface with the Schmittian model and its institutionalisation, making the standards of liberal constitutionalism gradually more legitimate for emergency powers.<sup>539</sup> In turn, this scenario precipitates tension between the two types of ‘enemies’ internal to the CoP, in that, the imposition of the SoE to exclude public enemies in the *concrete* sense—individuals/groups deemed to be threats to homogeneity—tends increasingly to be seen as an ‘enemy in the *institutional* sense’ itself. Put simply, this gravitational pull of Kelsen reflects how the resort to Schmitt’s notion of political friends and Agamben’s logic of the SoE undermine the Schmittian model by exacerbating the significant amount of disagreement over what constitutes ‘juridical void’ in the real-world political arena. Thus, while Schmitt spoke of the SoE *qua* the suspension of normativism in terms of a necessary means for resolving the PCLD, the Thai experience instead suggests that the logic of the SoE can help mobilise Kelsen’s idea to undermine Schmitt’s theory of law.

As with Section 4, I argue that the findings in Sections 6 and 7 confirm the more legitimate status of ‘Kelsen’, yet, subject to the gravitation pull of ‘Schmitt’. In Section 9, I

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<sup>537</sup> See Daniel McLoughlin, ‘The Fiction of Sovereignty and the Real State of Exception: Giorgio Agamben’s Critique of Carl Schmitt’ (2016) 12 LCH 509, p 515.

<sup>538</sup> Kelsen, *GTLs*, pp 285-286.

<sup>539</sup> Agamben, *SoE*, pp 53-54.



will conclude how the ‘*is-ought*’ relation and the function of liberalism underlying the Kelsenian and Schmittian models should be redrawn. Before that, I however need to review modifications for Kelsen and Schmitt in the context of the growing importance of liberal constitutionalism and the rise of the masses as suggested by contemporary scholars. Although these works are not directly concerned with emergency powers in the PCLD, their application to the pragmatic hybrid in Thailand indicates what would be inappropriate modifications for Kelsen and Schmitt, and, more importantly, reveals the counter-productiveness of the Weberian straight-line, in particular, the liberal-type.

## **8. Revisiting recommended modifications for Kelsen and Schmitt in contemporary literature**

In this section, I now turn to contemporary works of Criddle and Fox-Decent, Dyzenhaus, Gross, and Fatovic. These scholars suggest two ways in which the two models might be adapted in modern Thailand: a more rigorous commitment to liberal constitutionalism (Dyzenhaus and Criddle and Fox-Decent) and the role of the masses (Gross and Fatovic). Both suggestions share the view that Kelsen’s position is overly-procedural and that Schmitt’s is overly-factual.

### ***8.1 Strong reading of authority***

Dyzenhaus, Criddle and Fox-Decent together share the view that emergency powers should not be regarded simply as the monopoly of coercive force as Kelsen and Schmitt originally did. Dyzenhaus underlines the growing importance of liberal democratic standards in 21<sup>st</sup> century emergencies by distinguishing ‘rule of law’ from ‘rule by law’ or ‘the use of law as a brute instrument to achieve the ends of those with power’.<sup>540</sup> He accordingly rejects Schmitt’s theory of sovereign authority, criticising it for precipitating *the external realist position* by allowing the sovereign to act however he prefers subject to no legal constraints.<sup>541</sup> This distinction hints at Dyzenhaus’s attempt to fix what he deems to be a key flaw of Kelsen’s identity thesis. In contrast to Dyzenhaus, Criddle and Fox-Decent recognise the place of the Schmittian sovereign in the modern world and seek to balance it with increasing individual rights consciousness.

Against Schmitt, Dyzenhaus follows the Kelsenian line by presupposing the autonomous value of legality and the identity thesis. However, for him, the problem of the PTL, as previously discussed, lies in its scientific approach which eventually allows any

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<sup>540</sup> Dyzenhaus, *The Constitution*, pp 6, 30.

<sup>541</sup> Dyzenhaus, ‘The compulsion’, p 59.

content, including those bolstering an authoritarian regime, to be included within law, thus resulting in the internal realist position or the legalisation/constitutionalisation of any emergency powers invoked by political elites. This theory, though inspiring for the ‘rule of law’, then counter-productively leaves room for ‘rule by law’.<sup>542</sup> To make a genuine commitment to the identity thesis, Dyzenhaus modifies Kelsen by resorting to Hermann Heller’s approach which internally connects legality with legitimacy, in that, it denies the crude view that ‘law is the vehicle for the exercise of power’ and simply a framework that can be filled by any substance as Kelsen asserted in his PTL.<sup>543</sup> It then proposes the ‘supra-positive grounds of legal validity’.<sup>544</sup> In this respect, Dyzenhaus modifies Kelsen by supplementing *rationality* with *unreason*, that is, by adding ‘liberal morality’ to the grundnorm and thereby the identity thesis, arguing that emergency authority must be *morally infused* so that it is not turned into a mere utterance of the powerful made concrete.<sup>545</sup> Emergency legislation ‘must be capable of being interpreted in such a way that [it] can be enforced in accordance with ... [a] discourse of human rights’ and that it respects its addressees ‘primarily as a bearer of human rights’ who must be protected from the state’s arbitrary action.<sup>546</sup> Any failure to commit to such ‘principles of an inner morality of law’—the thicker version of the identity thesis—would disqualify its status as ‘law’ and eventually as acts of the state.<sup>547</sup> Dyzenhaus regards this modified identity thesis—*the substantive conception of the rule of law*.<sup>548</sup>

On the other hand, Criddle and Fox-Decent’s aim of balancing sovereign authority to transcend individual rights protection with increasing individual rights consciousness implicitly suggests how Schmitt’s thesis should be adapted to the global trends of liberalisation and democratisation by embracing *the fiduciary principle*, according to which, the state wields its authority on behalf of citizens, ‘but [subjects] to strict limitations arising from [the latter’s] vulnerability to the fiduciary’s power and his intrinsic worth as a person.’<sup>549</sup> State officials therefore hold an obligation primarily to ensure that the interests of its citizens, ‘treated as ends-in-themselves’ (the principle of *integrity*) and therefore as equal bearers of human rights (the

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<sup>542</sup> See Ibid, p 37.

<sup>543</sup> Dyzenhaus, *Legality*, p 173.

<sup>544</sup> Ibid, pp 200, 204.

<sup>545</sup> Dyzenhaus, *The Constitution*, p 19.

<sup>546</sup> Ibid, pp 12-13.

<sup>547</sup> Ibid, p 10.

<sup>548</sup> Ibid, p 5; David Dyzenhaus, ‘Schmitt V. Dicey: Are States of Emergency Inside or Outside the Legal Order?’ (2006) 27 Cardozo L. Rev. 2005, pp 2010-2011, 2031-2035; See also Paul P. Craig, ‘Formal and substantive conceptions of the rule of law: an analytical framework’ [1997] Public Law 467, p 467.

<sup>549</sup> Evan Fox-Decent and Evan J. Criddle, ‘The Fiduciary Constitution of Human Rights’ (2009) 15 Legal Theory 301, p 314.

principle of *formal moral equality*), prevail over the good of state officials (the principle of *solicitude*), even during emergencies.<sup>550</sup> Criddle and Fox-Decent concur with Schmitt that emergencies may not be foreseeable, thus leaving room for sovereign authority, but adapting it by subjecting it to the fiduciary principle.<sup>551</sup> Yet, against Schmitt, if the sovereign wields emergency powers in such a way that it fails to respect the above principles, ‘then he would be acting as an unauthorized usurper of public power rather than as the sovereign’ and therefore illegally.<sup>552</sup>

Overall, the three scholars share the view that *political* choices regarding when and how emergency powers are to be applied must commit to *principle*, notably the *value* of human dignity, existing separately from a positive law, yet, constituting a *constitutional* and *inner moral* condition of being an authority.<sup>553</sup> This principle then constitutes ‘the fundamental principle of legality’.<sup>554</sup> Ultimately, I regard their approach, which gives a greater weight to the justification/binding-ness perspective of emergency powers over its empowerment alternative, as a ‘strong reading of authority’.<sup>555</sup>

## 8.2 *The communicative-based authority*

Gross and Fatovic speak of the importance of the force *external* to the closed, self-referential system of law and politics—an active citizenry—in justifying legal and extra-legal emergency powers. Their theses ultimately embrace Jürgen Habermas’s criticism of Weber’s instrumental authority on which Kelsen’s and Schmitt’s theories rest.

Gross shares Schmitt’s concern that sometimes a rigorous commitment to legality during emergencies may cause ‘grave harm’ instead of good.<sup>556</sup> Advocating *the extra-legal model of emergency powers*, for him, public officials may employ extra-legal emergency measures, provided they consider it necessary for safeguarding the state.<sup>557</sup> Yet, he sees Schmitt’s support for legally unconstrained or extra-normative emergency powers as a hallmark of authoritarianism, and argues instead that those applying ‘extra-legal’ emergency measures—emergency powers which contravene legal norms—must disclose their actions, and

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<sup>550</sup> Ibid, p 318.

<sup>551</sup> Criddle and Fox-Decent, ‘Human Rights’, p 41.

<sup>552</sup> Ibid, pp 79-80.

<sup>553</sup> Ibid, p 42.

<sup>554</sup> Dyzenhaus, *The Constitution*, p 210.

<sup>555</sup> Stanley L. Paulson, ‘The Weak Reading of Authority in Hans Kelsen’s Pure Theory of Law’ (2000) 19 *Law and Philosophy* 131, p 133.

<sup>556</sup> Oren Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?’ (2003) 112 *Yale L.J* 1014, pp 1089, 1097.

<sup>557</sup> Ibid, p 1023.

subject them to popular *ex post* ratification.<sup>558</sup> He accordingly advocates applying the deliberation process, allowing ‘society as a whole’ to openly and inclusively participate in determining whether extra-legal emergency actions should be legally ratified (and even rewarded) or rebuked (and therefore making relevant public officials liable for their actions) after the emergency is over.<sup>559</sup>

The scope of Gross’s argument is expanded by Fatovic, who calls for rational exchanges of justifications, arguments, and opinions among individuals affected by emergency powers, legal and extra-legal in two ways.<sup>560</sup> First, he does not only speak of the application of deliberation to extra-legal emergency measures, but also, though briefly, to legal ones. Secondly, where Gross advocates limiting the role of the people to ‘voting up or down’ the validity of extra-legal measures, Fatovic expands this to include judging emergency decisions *still under consideration*.<sup>561</sup> For the latter, the public can participate in formulating and justifying strategies for dealing with exigencies through ‘[judging] the reasons offered for different measures, [challenging] the need for such measure at all, [proposing] their own alternatives, and [engaging] in a variety of other deliberative activities.’<sup>562</sup>

Both Gross and Fatovic offer various ways in which affected individuals can deliberate their viewpoints on emergency powers, for instance, public gatherings in townhall, informal meetings including academic conferences, newspaper articles, radio, television and the Internet.<sup>563</sup> Newspaper and social media, Gross adds, can function as a ‘social watchdog’, which helps prevent public officials from shielding their emergency actions from public opinion, thus, in turn, enhancing deliberation.<sup>564</sup>

Overall, both scholars criticise emergency *powers* wielded by the sovereign, under the Schmittian model, for prioritising ‘the common good’ over ‘private autonomy’ and for deriving their *authority* simply from the sovereign’s status as the embodiment of the homogenous people, thus ultimately limiting their role during emergencies merely to acclaiming sovereign decisionism. Fatovic is also tacitly against Kelsen’s approach, notably his preference for procedural formalism, according to which emergency powers derive their legal validity and become binding if enacted through a correct legal procedure. Put simply, both scholars think that both Kelsen and Schmitt conflated power with authority, while they propose detaching the

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<sup>558</sup> Ibid, p 1024.

<sup>559</sup> Oren Gross, ‘Extra-legality and the ethic of responsibility’ in Ramraj (ed), *Emergencies*, p 64.

<sup>560</sup> Fatovic, ‘Filling’, pp 177-179.

<sup>561</sup> Ibid, p 184.

<sup>562</sup> Ibid, pp 184-185.

<sup>563</sup> Ibid, p 188.

<sup>564</sup> Gross, ‘Extra-legality’, p 82.

two elements, involving *communicative-based authority*, which significantly draws upon Habermas's theory of communicative action.<sup>565</sup> For the communicative-based authority, emergency decisions constitute what Habermas calls 'speech acts'—a kind of communication through linguistic utterance between addressers and addressees.<sup>566</sup> Therefore, they do not simply connote a monopoly or one-sided application of coercive force, but are instead subject to criticism by affected parties along the normative dimension of validity with no *a priori* blueprint, including 'presumed inner morality' of state authority, and coercion.<sup>567</sup> Believing in reason and rationality of human beings, the people's *yes* or *no* determination is crucial together with official acceptance of the outcome for validating particular emergency action.<sup>568</sup> Following Habermas's line, Gross and Fatovic do not intend simply to arrive at a political compromise among affected individuals and between them and public officials, but ultimately at *agreements* inter-subjectively *shared* among these actors.<sup>569</sup>

### ***8.3 The application of the recommended modifications to the pragmatic hybrid in Thailand***

I now apply the above recommended modifications for Kelsen and Schmitt to the Thai context. Following what Dyzenhaus, Criddle and Fox-Decent observe, the scope of emergency powers in contemporary Thailand has increasingly become internally liberal. The Red and Yellow governments strove to justify emergency powers by expressing their commitment to a rule-bound legalism, notwithstanding the deficiency of formal legal constraints on emergency powers (i.e., a law deficit). Meanwhile, with Gross and Fatovic, the Thai contemporary experience reveals the important role of the masses in monitoring the exercise of state authority during the PCLD.

Above all, as already indicated, my main concern is nevertheless the technical and theoretical deficiencies and counter-productiveness exposed by the Thai experience for the modifications for Kelsen and Schmitt which apparently rely on the Weberian straight-line as they explicitly presuppose an authority derived from a dominant liberal-democratic interest and value. The pragmatic hybrid reveals that the suggested modifications based on the 'liberal-type' Weberian straight-line are not sufficiently comprehensive and may even be counter-productive for three reasons. First, given a CoI between the *Thai-ness* hegemony (i.e.,

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<sup>565</sup> Fatovic, 'Filling', p 173; Gross and Ní Aoláin, *Law*, p 170.

<sup>566</sup> Jürgen Habermas, *The Theory of Communicative Action: The Critique of Functionalist Reason Vol. 2* (Thomas McCarthy (tr), Polity Press 1989), p 30 ['TCA vol.2'].

<sup>567</sup> Habermas, *Between Facts*, p 38; Jiří Příbáň, 'Beyond Procedural Legitimation: Legality and Its 'Inflections'' (1997) 3 J.L. Soc'y. 331, p 334.

<sup>568</sup> Habermas, *TCA vol.1*, p 39.

<sup>569</sup> Habermas, *TCA vol.2*, p 319.

disinterest in liberal values) and demands for liberal constitutionalism, it is misleading to conclude that such liberalisation in Thailand stems from thickening and internally moralising Kelsen's identity thesis as the strong reading of authority suggests. As already indicated, the pragmatic hybrid highlights the need to revisit the Weberian straight-line. Secondly, due to Thailand's coup culture together with strong scepticism about liberalism, the pragmatic hybrid acknowledges that the attempt to thicken Kelsen's identity thesis does not guarantee the institutionalisation of the Schmittian model is prevented in practice. In fact, the attempt is more likely to be seen by the Yellow elites and the military as the usurpation of their privileges. Third, the pragmatic hybrid suggests that the Weberian straight-line underlying communicative-based authority aiming to adjust 'Schmitt' to a more liberalised society might counter-productively deepen, rather than quell, a CoI and the AoH in the PCLD. Ostensibly, the communicative-based authority requires the existence of reasonable citizens who are ready to defer to reasonable disagreement and to coordinate with each. However, as the mass protests and two coups between 2006 and 2014 show, hostility between the Red and the Yellow factions illustrates the lack of consensus regarding what counts as 'the norm' and 'the exception' since each faction possesses its own 'yes/no' position on legitimate/illegitimate emergency powers, making a shared agreement difficult, if not, impossible. In fact, any attempt, as under communicative-based authority to reach a 'yes/no' answer, as with the initiation of the 2013 Amnesty Bill, tends to galvanise the dissatisfaction of one faction, creating another round of the PCLD.

Having examined what counts as inappropriate modifications, in the next section, I consider the scope of emergency powers and the structure of the Kelsen-Schmitt debate in the context of the pragmatic hybrid.

## **9. The scope of emergency powers and the structure of the Kelsen-Schmitt debate reconsidered: the fragile equilibrium**

Given the paradoxical friction and the PDC, it is apparent that liberalism is still, as in their original debate, fundamental to the pragmatic hybrid. As indicated in Sections 4 to 8, although we cannot expect the *full* implementation of liberal democracy and the PoA *qua* the PFCN in Thailand, liberalism at least appears to be a more acceptable standard for emergency powers which *both* parties to the PCLD are prepared to adopt. This trend greatly discredits Schmitt's arguments against liberalism, i.e., that it is a source of the PCLD, while *ex ante* legal constraints it advocates prevent any application of necessary, but not legally prescribed, means for repressing threats to a concrete order. Instead, the liberalisation of emergency powers is essential for avoiding greater struggles by each side. However, the main impetus for their

liberalisation, or more theoretically speaking, for a move on the side of Kelsen is not an autonomous value of legality, but the need to avoid costs and uncertainties raised by Agamben's logic of the SoE resulting from the defects of Kelsen's and Schmitt's theories themselves, namely the 'Schmittian-isation' of the impersonal legal-technical apparatus and the rift between the three types of juristic thought respectively. The pragmatic hybrid exposed by the Thai experience therefore challenges both Kelsenian and Schmittian positions on the SoE. Against Kelsen who rejected the SoE *qua* 'the apparent suspension of normativism', seeing it as a mark of authoritarianism, the pragmatic hybrid recommends more broadly considering it as an opportunity for mobilising a commitment to the PoA in the real-world political arena. Meanwhile, contrary to Schmitt who positively conceived the SoE *qua* the suspension of normativism as the mark of unity of the three types of juristic thought, *the ultimate undecidability* exposed by the pragmatic hybrid precipitates their rupture which undermines the CoP. Accordingly, the challenge remains how the alternative function of liberalism should be conceptualised. Here, I argue that liberalism plays a role in the context of the pragmatic hybrid in determining what I call *the fragile equilibrium*.<sup>570</sup> Below, I first describe the general characteristics of what I mean by the fragile equilibrium.

At the outset, the fragile equilibrium does not directly aim to ensure that emergency powers are not applied to subvert the politics of reconciliation. Neither is it concerned with 'the process of balancing' and assigning 'appropriate weight' to national security/public interest and the protection of rights and liberties, nor with the 'trade-off' between national security and the aforesaid protection as Schmitt proposed.<sup>571</sup> Rather, based on the key features of the pragmatic hybrid, it generally connotes preserving a faction's political legitimacy based on *political prudence* when it comes to the matter of emergency powers in the PCLD.<sup>572</sup>

Secondly, it follows from the first characteristic that since liberalism has become a more acceptable standard for the use of emergency powers in the PCLD, the fragile equilibrium is more on the side of 'Kelsen' than 'Schmitt'. Yet, given that its main concern is a nascent democracy, the purpose of such equilibrium is not as ambitious as one might perceive. By highlighting the importance of political prudence in driving the liberalisation of emergency powers, it does not speak of how to raise liberalism to the status of a constitutional and moral

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<sup>570</sup> I modify this term used by Ferrara to describe temporary political stability between 2011 and 2013. Ferrara, *Political Development*, p 281.

<sup>571</sup> See Michael Freeman, *Freedom or Security: The Consequences for Democracies Using Emergency Powers to Fight Terror* (Praeger 2003); Oren Gross, 'The Process of Balancing' (2010) 45 *Tulsa L. Rev.* 733, pp 734-742.

<sup>572</sup> See Tan, 'From Myanmar', p 184.

principle, i.e., a compulsory, intrinsic, and quintessential political morality of emergency powers, as does Dyzenhaus, Criddle and Fox-Decent, Gross, and Fatovic.<sup>573</sup>

Instead, we should then, thirdly, be aware that a growing commitment to liberal standards in the context of the pragmatic hybrid hinges not on a commitment to the ‘liberal-type’ Weberian straight-line, but on the need to avoid overstepping the fragile equilibrium. As ‘political prudence’ associated with this context is fundamentally a matter of political, rather than legal, judgment, the fragile equilibrium therefore invites us to revisit the Weberian straight-line, including the relation between law and politics, underlying Kelsen’s and Schmitt’s models.

### ***9.1 The Weberian straight-line reconsidered***

Subject to the general ideas underlying the pragmatic hybrid, I argue that the fragile equilibrium initially provides three important lessons for the theoretical structure underlying the Kelsenian and Schmittian models, in particular, their underlying Weberian straight-line approaches, and for the modifications suggested as discussed in Section 8.

To begin with, where the models of Kelsen and Schmitt contained a CoI/the AoH associated with emergency powers in the PCLD within either the liberal-democratic legal system or the anti-liberal political system, the problem in Thailand is that neither constitutes the hegemonic version of an intra-systemic interest in the first place. Subject to the pragmatic hybrid, the fragile equilibrium instead recognises ‘the social multitude’ as the social environment which co-exists with the legal and political systems.<sup>574</sup> However, since the fragile equilibrium does not aim to raise liberalism to the status of a constitutional and moral principle, it perceives the people neither as ‘the final authority’ to judge the legitimate use of emergency powers, as suggested by the communicative-based authority, nor in terms of the value of human dignity which constitutes a *constitutional* and *inner moral* condition of being an authority according to the strong reading of authority. It only conceives ‘active citizenry’ as an important element for determining how emergency powers should be applied to deal with a CoI/the AoH in the PCLD.

The second lesson parallels the first. When speaking of an intra-systemic interest and a CoI, Kelsen and Schmitt defined interest as a reflection of value. Given that both scholars underestimated the asymmetry between the two senses of interest and the importance of the social multitude, they were accordingly silent on political prudence associated with the fragile

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<sup>573</sup> Cf Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006), p 244.

<sup>574</sup> Přibáň, ‘Self-Reference’, p 327.



equilibrium which reinforces a commitment to legality. Clearly, political prudence here stands independent from the closed, self-referential system of law and politics. Likewise, by adopting the ‘liberal-type’ Weberian straight-line, the two suggested modifications for Kelsen and Schmitt—the strong reading of authority and the communicative-based authority—are also silent on the liberalisation of emergency powers disinterested in a commitment to the value of liberalism. Put simply, according to the Thai experience, the fragile equilibrium reveals an alternative facet of interest beyond ‘a motor-affective attitude’ bound to value.

The third lesson is related to the approaches inherent in (a) the PoA and the strong reading of authority on the one hand; and (b) Schmitt’s anti-liberal realist model and the communicative-based authority on the other. In Thailand, the realisation of (a) to deal with a CoI and the AoH associated with emergency powers in the PCLD is compromised by the problems of *a law deficit* and *a norm deficit* mentioned in Chapter 3. By contrast, (b) advocates that ‘concrete factuality’ prevails over ‘legality’. However, rising liberal demands precipitate the declining hegemonic status of the politics of exclusion. Meanwhile, by heavily relying on the yes/no decisions on ‘valid’ emergency powers (though legality/liberal constitutionalism plays a role as the standard), the application of communicative-based authority in the context of a high degree of societal polarisation, as suggested by the enactment of the Amnesty Bill in Thailand, is prone to galvanise the AoH. Ultimately, I argue that the fragile equilibrium challenges determining what constitutes the legitimate use of emergency powers and responding to a CoI and the AoH associated with it by relying exclusively on either (a) the doctrine of legal imputation and the fundamental principle of legality or (b) concrete factuality.

Subject to the pragmatic hybrid, I conclude that the fragile equilibrium leaves the coercive enforcement of emergency powers (facticity) colliding with rational acceptability (validity) within the real-world political space subject to political prudence. In doing so, it then conceives of ‘interest’ not primarily as ‘a motor-affective attitude’ like Kelsen and Schmitt and their suggested modifications but as ‘self-interested preservation’. This sense of interest opposes strictly conflating ‘authority’ and ‘interest’ with value ‘*ought*’, and instead stands in between an intra-systemic interest and a CoI as what determines the legitimate practice of emergency powers is related to what *ought to be done* for best preserving a faction’s own legitimacy during the PCLD. As we have seen, the greater the level of social polarisation bred by the PCLD, the more the alternative understanding of Agamben’s SoE suggested above needs to be taken into account when applying emergency powers in order to reinforce such preservation. Put simply, this aforesaid ‘best preservation’ clearly involves adopting a more liberal approach to emergency powers in the PCLD.

## ***9.2 The theoretical characteristics of the alternative role of liberalism: redrawing the relationship between ‘law’ and ‘politics’ in the Kelsen-Schmitt debate***

Following from my last argument above, we should now revisit the role of liberalism in the Kelsen-Schmitt debate. Subject to the paradoxical friction, the PDC, and the fragile equilibrium, it can be concluded from the outset that liberalism in the context of the pragmatic hybrid neither exclusively sides with the Kelsenian notion of normativism nor holds the Schmittian account that ‘law [is] a mere instrument of political power and that it can stabilize politics only if the political power is exercised [based on an institution, that is,] a substantive homogeneity in the population subject to the law.’<sup>575</sup> Rather, based on the three lessons discussed above, liberalism in this context is tied to the importance of political prudence associated with the fragile equilibrium and the gravitational pull between Kelsen and Schmitt. It therefore functions to connect law with politics, however not within a closed, self-referential system but within the real-world arena of strategies with each having to account for the vitality of the other. It is thereby turned into a policy device providing the axis of the gravitational pull of the paradoxical friction, and plays a role in conveying the message directed at both officials and addressees of emergency powers, that by politically committing to it, the risk of overstepping the fragile equilibrium that exacerbates a CoI, the AoH, the paradoxical friction, and the PDC is mitigated. Put simply, the pragmatic hybrid suggests that we think about liberalism in terms of *its political normative role*. My next task is to conclude how such a role theoretically redraws the relation between law and politics in Kelsen’s and Schmitt’s models.

On the one hand, a staunch proponent of the strong reading of authority like Dyzenhaus is likely to refute that by merely speaking of law *qua* a message conveyor, this political normative role leaves room for ‘external realist position’ which suggests that public authority stems from the purely political force unconstrained by the rule of law, thus making the realisation of Kelsen’s identity thesis fictitious.<sup>576</sup> I am aware that such a role still leaves this room, but deny that it subverts the identity thesis. Here, I should recall that Dyzenhaus’s proposal assumes a strong liberal-democratic culture and is therefore silent on the developmental phase of the identity thesis. Meanwhile, by conceiving Kelsen’s methodology of legal science and his political relativism as ‘the worms in his apple’ which precipitate the problem of ‘an empty proceduralism’, he also negatively thinks that politics is a threat to the Kelsenian attempt to realise liberalism through the PTL. The political normative role of

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<sup>575</sup> David Dyzenhaus, ‘The Concept of the Rule-of-Law State in Carl Schmitt’s *Verfassungslehre*’ in Meierhenrich and Simons (eds), *The Oxford Handbook*, p 492.

<sup>576</sup> See Section 8.1

liberalism counters these arguments by reaffirming the pragmatic perspective that, rather than exclusively examining the PTL *qua* the cognition of legal norms (*'ought'*), we should consider factuality *'is'* necessary for helping realise the PoA in a developing democracy like Thailand. In other words, it suggests Kelsen should regard Schmitt as a reminder that abstraction has meaning only provided it is turned into *'a political phenomenon'*.<sup>577</sup> According to the pragmatic hybrid, the PoA is therefore meaningful, not primarily because the identity thesis is internally or externally moralised as suggested by the strong reading of authority and the communicative-based authority, but because it is contested and embraced by all contesting parties to the PCLD when their benefits are threatened to avoid the costs and uncertainties raised by the logic of the SoE driven by either *'Schmitt in Kelsen'* or *'Kelsen in Schmitt'*. In doing so, the PoA is then turned into an integral part of standardised conduct within a society—a concrete order, thus shifting our understanding from the PTL *qua* the legitimacy of legality to the PoA *qua* the legitimacy of law, that is, not only *qua* *'a substantive content'* of emergency powers in the PCLD but also and increasingly *qua* *'more legitimate qualities'* for them.<sup>578</sup> This shift, in turn, not only enables Kelsen to counter the external realist position, but also Schmitt's criticism that his theories of law and politics merely assert an empty proceduralism cloaking the internal realist position.

It follows from the above that the political normative role of liberalism challenges Scheuerman's and Gross's observations mentioned in Section 2 which consider Schmitt's theories of law and politics in terms of the attempt to replace Kelsen's formal normativism with *'the norm-less'* will of the sovereign. In other words, it invites us to think beyond what McCormick regards as *'the dilemmas of dictatorships'* which assert, in general, that the more sovereign authority is resorted to preserve a social order, the greater the authoritarian rule is likely to invite the disposability of legal-technical procedures of such an order.<sup>579</sup> Rather, the pragmatic hybrid exposes the dilemma for Schmitt between the imposition of his declining model and its insulation from rising liberal demands which ultimately turns him into a victim of his own logic. On the one hand, the more the Schmittian model is vehemently imposed, the more this act flouts Schmitt's own logic which prefers basing emergency authority on the legitimacy of law *qua* the concrete-order framework. However, by proposing the CoP/the

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<sup>577</sup> Hidemi Suganami, *'Understanding sovereignty through Kelsen/Schmitt'* (2007) 33 *Rev. Int. Stud.* 511, p 514.

<sup>578</sup> See Heiner Bielefeldt, *'Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Countercriticism'* in David Dyzenhaus (ed), *Law as Politics: Carl Schmitt's Critique of Liberalism* (DUP 1998), p 33; Richard Stacey, *'Constituent power and Carl Schmitt's theory of constitution in Kenya's constitution-making process'* (2011) 9 *I•CON* 587, p 609.

<sup>579</sup> McCormick, *'The Dilemmas'*, pp 163, 185.

existential concept of the constitution *qua* the politics of exclusion as an essential condition for sustaining the state, Schmitt was unable to address how to integrate the competing, yet, contradictory parts of a concrete order. Theoretically, this failure, I contend, stems from the fact that Schmitt defined the CoP *qua* the transcendental possibility for the political order, thus resulting in its inability to account for what Vinx calls ‘the politics that takes place below the threshold of the political’.<sup>580</sup> Nevertheless, Vinx does not clarify what he means by such politics. The growing need to shift from Schmitt’s radical legitimacy of law to the liberalisation of emergency powers without the ‘moral value of liberalism’ due to the rift between the three types of juristic thought ostensibly reflects Vinx’s politics below the political. This political space outside the category of legal imputation below the threshold of the political defines what I call ‘the arena of strategies’ associated with the suggested political normative role of liberalism. Meanwhile, on the other hand, the growing resort to the Kelsenian technique of the legitimacy of legality to insulate the Schmittian constitutional emergency model from liberalism *qua* a contending part of a concrete order paradoxically comes with the ‘parallel-side effects’ of acknowledging legal ‘*ought*’ as a separate realm and taking political account of legitimisation. The more the Kelsenian realm of legal ‘*ought*’/*the iron cage* is exploited, yet, conceived as an independent sphere *detached from* sovereign authority necessary for shielding the hegemony of the anti-liberal realist model from liberal standards, the more these standards are transferred into a separate *political* account of legitimisation outside *the iron cage* but *attached to* the concrete circumstance of real-life. In fact, such exploitation also drives forward the SoE from the angle of ‘Schmitt in Kelsen’, making a commitment to liberal legality more important to avoid overstepping the fragile equilibrium and therefore reaffirming its place in a concrete order. This dilemma ultimately invites us to more meticulously comprehend ‘Schmitt in Kelsen’ *qua* a matter of hegemonic preservation. This instance, though preserving the status of the sovereign as the embodiment of political unity in the realm of legal ‘*ought*’ beyond the cut and thrust of political conflict, would involve increasingly abandoning the notion that sovereign authority is ‘absolute’ in the real-world political sense to avoid greater costs and risks against its declining legitimacy.

The suggested role also finally invites us to reconsider, in the broadest sense, the nature of emergency powers in the Kelsen-Schmitt debate. Kelsen and Schmitt, as we have seen, saw emergency powers as ‘an occasional response to a situation of existential crisis’, including the

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<sup>580</sup> Martin Loughlin, *The Idea of Public Law* (OUP 2003), p 30; Vinx, ‘The incoherence’, p 113.

PCLD.<sup>581</sup> They are therefore expected to be applied in accordance with, and are meant to preserve and restore, what each regarded as ‘the norm’. However, the pragmatic hybrid in Thailand encourages us to think beyond the key questions underlying the Kelsen-Schmitt debate—how to attribute emergency powers in the PCLD to the state and how to pacify the AoH associated with them. The Thai situation, I again reiterate, indicates that although the application of emergency powers based on the CoP might help realise short-term stability, they tend to be counter-productive in the long run due to the country’s rising political friction. The fragile equilibrium then reveals another important facet, namely how the application of emergency powers affects the development of the PCLD. This question involves how to avoid turning their application into, to borrow Ramraj’s term, ‘a symbolic rallying point’ which provokes a greater social polarisation in the long term, which is likely to incur a greater cost for the Schmittian than for the Kelsenian model.<sup>582</sup> However, against Kelsen’s state-based approach which attributes to a specialised legal institution—the Constitutional Court—the monopoly of controlling the constitutionality of, and attenuating the AoH associated with emergency powers in the PCLD, the pragmatic hybrid in Thailand reminds us that normativism realised through the closed, self-referential system of law alone cannot prevent the aforesaid turn. Instead, its prevention, to quote Dressel, ‘cannot be separated from social struggles over political power’, that is, from what Schmitt regarded as ‘the political’ to undermine the legitimacy of the politics of exclusion and dictatorship.<sup>583</sup>

## **10. Conclusion: beyond an exclusive response to the Weberian paradox of modernity/liberalisation**

Both Kelsen’s and Schmitt’s competing views on emergency powers in the PCLD are grounded in the Weberian paradox of modernity and liberalisation. They similarly ask whether the triumph of rationality over unreason/delusion, supported by liberal democracy, helps reconcile the AoH bred by emergency powers in the PCLD or whether it invites ‘a war between mini-gods’ (the polytheism of values/unreason) which leads to ‘the death of God’ (the homogeneity of the state).<sup>584</sup> Emergency powers in Thailand warn us of the pragmatic hybrid as a way of residing or at least reducing the legal, political, and social struggles between ‘Kelsen’ and ‘Schmitt’ as raw conflicting interests and values. The paradoxical friction, the

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<sup>581</sup> McLoughlin, ‘Giorgio Agamben’, p 698.

<sup>582</sup> Victor V Ramraj, ‘Between Idealism and Pragmatism: Legal and Political Constraints on State Power in Times of Crisis’ in Ben Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007), p 198. Also, see Chen, ‘Emergency powers’, p 86; Colm Campbell, ‘Law, terror and social movements: the repression-mobilisation nexus’ in Ramraj (ed), *Emergencies*, p 182.

<sup>583</sup> Dressel, ‘When Notions’, p 464; Ramraj, ‘Emergency Powers’, p 199.

<sup>584</sup> Dyzenhaus, ‘Now the Machine’, pp 5, 13.

PDC, and the fragile equilibrium challenge the ways in which Kelsen and Schmitt addressed the Weberian paradox of modernity/liberalisation. Where the Schmittian model cannot totally deny increasingly accommodating itself with the polytheism of values and accepting the emerging legitimacy of liberal constitutionalism, the Kelsenian alternative cannot refrain from struggling against the Schmittian attempt to sustain and re-invoke sovereign authority. Therefore, the main challenge for the application of the Kelsenian and Schmittian models here is to recognise their gravitational pull upon each other. Ultimately, I contend that Thai political crises recommend thinking of the conflict between the Kelsenian and Schmittian ideas and their supporters in Thailand as *binary-star-system*—the pro-democracy or ‘Red’ star and the anti-liberal realist or ‘Yellow’ star. In Chapter 5, I conclude the key features of *the binary-star conception of emergency powers* based on my findings in this chapter.



## **Chapter 5: Conclusion: Kelsen and Schmitt in Thailand's binary-star-system**

*'Thai politics is as spicy as its food.'*

Hillary Clinton<sup>585</sup>

### **1. Introduction**

This PhD thesis confirms Chen's advice that 'the study of emergency powers should take into account the context of the political systems in which [they] are established and exercised.'<sup>586</sup> The raw conflicting interests and values between the pro-democracy forces and the rightist conservatives in Thailand have precipitated a very high degree of polarisation and instability. While military coups have become outdated in many post-authoritarian upper-middle-income, newly-industrialised countries such as Argentina, Brazil, or Turkey, 21<sup>st</sup> century Thailand is still prone to an apparently endless round of emergency situations, the PCLD, and coups. The final task of this PhD thesis is to conclude the lessons the Thai experience has for the Kelsen-Schmitt debate, in particular, for their theories of law and politics. Based on my findings in Chapter 4, I argue that the more the supporters of each constitutional emergency model struggle to assert its legitimacy, the more these models gravitationally pull the other, thus resulting in what I call *the binary-star conception of emergency powers*.

### **2. The features of the binary-star conception**

This section identifies the key features of the binary-star conception of emergency powers. I use the metaphor 'binary-star-system'—the Yellow and the Red stars—to conclude the paradoxical friction, the PDC, and the fragile equilibrium which expose the gravitational relation between Kelsen and Schmitt in contexts such as Thailand because they resemble two stars which orbit around a common centre of gravitation, yet, no star absolutely dominates the other. Instead, each is subject to the gravitational pull of the other, possibly leading to their collision. Based on the synthesis in Chapter 4, the key features of this conception can therefore be identified as follows.

To begin with, the binary-star conception generally exemplifies the asymmetry between Kelsen and Schmitt as jurists/theorists and Kelsen and Schmitt as representatives of raw conflicting interests and values in the PCLD. In the process, it exposes two conditions which compromise the full implementation of Kelsen's and Schmitt's original theses based on the

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<sup>585</sup> Suthichai Yoon and Veenarat Laohapakakul, Interview with Hillary Clinton, United States Secretary of State (Bangkok, 24 July 2009).

<sup>586</sup> Chen, 'Emergency powers', p 83.



normative perspectives of *individualism/collectivism*, *scepticism*, and *hostility*: (a) the gravitational pull between ‘Schmitt in Kelsen’ and ‘Kelsen in Schmitt’ and (b) the asymmetry between the closed, self-referential system and a CoI/the AoH. It also indicates what would be inappropriate modifications for Kelsen and Schmitt, namely the rigorous adoption of the ‘liberal-type’ Weberian straight-line—the strong reading of authority and the communicative-based authority.

The conception is based on the paradoxical friction, the PDC, and the fragile equilibrium assessed in Chapter 4, thus redrawing the relation between key ideas and elements in Kelsen’s and Schmitt’s theories of law and politics as follows. Firstly, the competing conceptions of ‘institution’ adopted by Kelsen and Schmitt, and Agamben’s logic of the SoE each become tools for reinforcing and undermining each the opposing model, by proposing an alternative beyond the ‘contrasting’ and ‘supplementary’ approaches. Secondly, the binary-star conception, in particular, the fragile equilibrium, reflects the growing shift from endorsing liberalism *qua* the dominant norm and *qua* the category of legal imputation, based on the framework of *individualism*, *scepticism* and *hostility*, increasingly and pragmatically to accepting liberal standards as the axis of gravitation which orchestrates the direction of the AoH associated with emergency powers in the PCLD. This shift concludes that legality/normativism (Kelsen) in a fledgling democracy like Thailand increasingly needs to seek refuge in politics to enable its struggle in the real-world political space, while Schmittian political existentialism, given its declining legitimacy, can no longer avoid being politically gauged against liberal constitutionalism. Below, I first consider the gravitational pull of Kelsen upon Schmitt, and then *vice versa*. Then, I speak of the possible gravitational pull in post-2018 Thailand before identifying theoretical factors orchestrating the gravitational strength of the two stars.

### ***2.1 Schmitt gravitationally pulling Kelsen***

In the context of global trends towards constitutionalism, modernisation, liberalisation and democratisation, the Thai experience shows the growing impossibility for the right-wing conservatives totally to ‘repress’ liberalism. Despite Schmitt’s attack against the legitimacy of legality and the politicisation of the judiciary in his original works, the institutionalisation of the politics of exclusion and its source within the realm of legal ‘*ought*’ then becomes increasingly essential in the binary-star scenario. I conclude my findings in this thesis as follows.

On the one hand, where Schmitt originally called for annihilating political romanticism, Thailand’s binary-star-system reveals the importance of ‘co-optation’ by

constitutionalising a space for it, together with mechanisms functioning to discredit its legitimacy, so as to preserve the possibility of re-invoking sovereign authority and the declining hegemonic status of the rightist conservatives given democratisation and liberalisation. Accordingly, from the perspective of the Schmittian pull of gravity, liberalism is co-opted not because it is believed to be essential for reconciling the AoH associated with emergency powers in the PCLD, but partly because it is useful for weakening the shining Red star and for invigorating the increasingly sombre Yellow star, thus keeping the possibility of the sovereign's decisions alive.

Besides, the roles of the Constitutional Court in engineering a political vacuum and in guaranteeing the rights and liberties of supporters of the Schmittian model also connote how Kelsen's PoA is subject to the pull of Schmitt's CoP. In Thailand, emergency powers in the PCLD preserved, or at least did not fatally damage, liberal democratic standards because they were ineffective to disperse protest by 'the genuine Thais' professing themselves as the guardians of *Thai-ness*. This is why the Yellow faction did not vehemently oppose the imposition of the ISA as compared to that of the 2005 Decree, and why the Red governments were not condemned in human rights reports. Meanwhile, the PoA formally operated when emergency powers were applied *by* 'public enemies'—the Red government—against the guardian of *Thai-ness*—the Yellow protesters—as the Constitutional Court judges were prepared to safeguard rights and liberties of the latter notwithstanding their aim to overthrow liberal democracy. Yet, the crackdowns on Red Shirts protesters in 2009 and 2010 and the 2013-2014 political crisis which led to the 2014 coup, indicated that liberal constitutionalism became a meaningless constraint on emergency powers, especially when the latter were invoked *against* public enemies. Accordingly, as these contrasting roles led to what I call *extreme factuality* (the extreme reference to fact without law) and *extreme legality* (the extreme reference to legal principles without considering their substance and fact), the effectiveness of the PoA based upon the CoP in the binary-star system subsequently fall prey to Agamben's logic of the SoE since its operation is premised not on law but on 'a space devoid of law' deactivating consideration of legal substances. Besides, due to its discriminatory nature and the rise of pro-democracy movements, this gravitational pull contributes to the paradox, in that, the more the PoA is applied to preserve liberal values merely to serve the interest of the Yellow faction, the more this project becomes fictitious as its own ethos—political reconciliation—is subverted.

## 2.2 Kelsen gravitationally pulling Schmitt

Recalling his debate on the nature and use of emergency powers with Schmitt, Kelsen spoke of liberal constitutionalism *qua* normativism. Nevertheless, this legitimacy of legality is largely subject to gravitational pull by Schmitt since its effectiveness and ineffectiveness are determined by the CoP. Notwithstanding this problem, looking back on the fragile equilibrium which orchestrates the AoH associated with emergency powers in the Thai PCLD, it reflects Kelsen gravitationally pulling Schmitt. The Thai experience also indicates the lasting impact in terms of afterlife of a defunct constitution—the 1997 Constitution—in invigorating the Kelsenian gravitational pull. Although it ultimately failed in firmly implementing Pridi Banomyong’s aspiration and in resolving the problem of *constitutional saṃsāra*, the 1997 Constitution, to quote Harding and Leyland’s words, is however ‘a visible symbol of constitutional progress’ and of anti-coup sentiment, thus providing a political benchmark against any deviation from liberal standards even after its formal demise.<sup>587</sup> Overall, the Kelsenian pull of gravity does not only suggest re-thinking law beyond the authority of rules, but also the paradox of Schmitt’s politics of exclusion.

As already discussed, the application of emergency powers in the PCLD is partisan and cannot avoid struggling to a great degree with the AoH. From the Thai experience, any deviation from a commitment to legality and pluralistic democracy by invoking emergency powers—in particular, a complete censorship of anti-government media and the dissolution of protest through the use of a military force or coup directed at limiting the freedom of expression of the political oppositions and ultimately at ending their activities—tends more firmly to designate them as an ‘opposition’ and even ‘a problem’. Subject to the alternative understanding of the SoE mentioned in Chapter 4, a commitment to legality and pluralistic democracy on the part of the state therefore has the significant effect of diminishing the AoH, which, in turn, helps reduce the ‘uncertainties and risks’ entailed by radical reactions against, or a greater polarisation rendered by, emergency powers in the PCLD. Here, I am not speaking of the object of the Kelsen-Schmitt debate, that is, the role of liberal constitutionalism as ‘the institutional form for the normative regulation of state power’.<sup>588</sup> Instead, the Thai case suggests reconsidering liberalism as a contending part of a concrete order, that is, in terms of the legitimacy of law which concerns the legitimate content of particular state decisions, by conceiving it as a basis on which contentions between competing interests and values are

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<sup>587</sup> Harding and Leyland, ‘The Constitutional Courts’, p 119.

<sup>588</sup> Mark Tushnet, ‘The Political constitution of emergency powers: some conceptual issues’ in Ramraj (ed), *Emergencies*, p 145.

organised. Liberalism then politically functions as a policy device, that is, as ‘a helm’ steering the fragile equilibrium in a certain direction. The more emergency powers on the part of the state are committed to liberal democracy and constitutionalism, the more the ‘political costs’ are thrown back to the competing faction if it chooses to counteract those powers by using means contrary to liberal democratic standards such as efforts to paralyse the government’s capacity to govern, or by spearheading a coup as per the Yellow faction. My last point also leaves open the issue of how the function of liberalism as ‘a helm’ affects Schmitt’s original CoP.

The nature and use of emergency powers in Thai political crises further expose the conflict between Schmitt’s realist constitutional approach and his distaste for liberalism. They show that legality and democracy appeal to addressees of such powers, even those of the Yellow faction. In this situation, the more the sovereign strives to exclude his enemies through emergency powers, the more he is enmeshed in a conflict, and increasingly loses his legitimacy as of a *pouvoir neuter*, or more generally, his real-world political sovereignty, especially in the eyes of pro-democracy forces. This aforesaid political cost is also thrown upon the flip side of Schmitt—*Militant Democracy*, that is, the imposition of emergency powers to exclude political opponents stigmatised as enemies of liberal democracy. Here, the role of liberal constitutionalism in steering the fragile equilibrium then triggers *the paradox of the politics of exclusion*. That is to say, the more vehemently emergency powers are applied and the more ‘Schmitt’ is institutionalised to establish the SoE to exclude enemies in the *concrete* sense, the more their struggle with ‘Kelsen in Schmitt’ creates the rift between Schmitt’s three types of juristic thought, making the anti-liberal realist model counter-productive and self-destructive.

### ***2.3 The post-2018 gravitational pull?***

The conflict between the Red faction and the Yellow faction is still ongoing in Thailand. Although the NCPO successfully prevents another mass protest through harsh emergency powers directed at the UDD and other pro-democracy activists, the rift seems to be greater than before, but now swept under the carpet, given the continuing emergence of pro-democracy movements, especially among new generations and the assiduous effort by the Yellow faction to take a firm grip on power. The arguments presented in Chapter 4 are proving to be applicable, and probably will be for decades, notably due to the promulgation of the current 2017 Constitution.

After the 2014 coup, the NCPO implicitly followed the demands of the PDRC by creating the National Reform Assembly (‘NRA’) responsible for conducting ‘political reform’, notably by ensuring that politics is run/supervised by traditional elites. It also appointed the

key drafter of the 1997 Constitution, Borwornsak Uwanno, who had previously joined the PDRC rallies in 2013 and 2014, to draft a new permanent constitution. Borwornsak's draft allowed the President of the Constitutional Court to convene an assembly of the heads of the legislative, executive and judicial branches, the President of the Senate (appointed by the junta), the leader of the opposition party, and all the Presidents of the independent agencies to decide on a volatile political situation, that is, both to govern during this situation and to decide whether the situation constitutes a political crisis.<sup>589</sup> However, the Red faction and pro-democracy groups largely criticised such provision for letting technocrats determine the direction of the crisis.<sup>590</sup> Wary of another round of crises, the NRA rejected it in September 2015, forcing Prayuth to create the new CDC of 21 members, presided over by a right-wing veteran technocrat, Meechai Ruchuphan.<sup>591</sup> Supot Kaimook, an anti-Thaksin (former) Constitutional Court judge, was also a member of this committee. This time, the NCPO sought popular legitimacy for Meechai's draft by amending the 2014 Interim Constitution to organise a national referendum in August 2016 (Borwornsak's draft only required the approval by the NRA). Harsh suppression of dissenting voices through M-44, 'crude' demands for political stability galvanised by exhaustion of the colour-coded crises, and weariness of uncertainty if the draft had been voted down, led to its approval (61.35% or 16,820,402 people in favour). Yet, the majority of those living in the North and Northeast, the bastion of the Red faction, disapproved. Ironically, many of Thaksin's supporters, notably in his hometown, Chiang Mai, chose to vote for the draft, possibly because of their belief that the PT will again win a landslide election despite the attempts of the Yellow faction to subvert it. Given King Bhumibol's passing on 13 October 2016, the draft was later endorsed by King Vajiralongkorn (2016-present) on 6 April 2017.

Compared to its 2007 predecessor, the 2017 Constitution, though outwardly restoring the semblance of liberal democracy, increasingly limits a space for electoral politics, and casts greater doubt on political romanticism. It enhances a stealthy military-supervised rule by appointing as Senators the Supreme Military Commander, the Chiefs of the Royal Thai Army, Navy and Air force, and the permanent secretary of the Ministry of Defence.<sup>592</sup> More importantly, it relies on *Thai-ness*, i.e., royal authority, rather than a kind of 'Crisis Panel' in

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<sup>589</sup> Section 5 of Borwornsak's constitutional draft

<sup>590</sup> Wasamon Audjarint, 'Scepticism over 'crisis' panel' (*The Nation*, 13 August 2015) <<http://www.nationmultimedia.com/politics/Scepticism-over-crisis-panel-30266477.html>> accessed 1 December 2017.

<sup>591</sup> Section 38 of the 2014 Interim Constitution

<sup>592</sup> Section 269

addressing future political turmoil.<sup>593</sup> Meanwhile, it also preserves the Constitutional Court's position as the guardian of *Thai-ness* given that the Court still holds its authority under Section 49 (previously Section 68 of the 2007 Constitution) to decide, especially during emergencies, on what counts as acts threatening the DRMH. Actually, the new constitution even fortifies this role after constitutional court judges are entrusted to prescribe 'ethical standards' for politicians who are to be virtuous and moral.<sup>594</sup> The Constitutional Court can dismiss those who fail to comply with the code, a power which might possibly be used to purge politicians of the Red faction during future emergencies.<sup>595</sup> Constitutional court judges appointed under the new constitution played a vital role in doing away with Thaksin's faction between 2006 and 2014, notably Jarun Pukditanakul and even the new President, Nurak Marpraneet.

Given the continuing collision between pro-democracy and rightist-conservative forces, the tension between the Schmittian model and liberal constitutionalism, together with the state of impasse it engenders, are likely to persist for many years. The 2017 Constitution mirrors the Yellow faction's increased attempt to ensure *Thai-ness* hegemony and the anti-liberal realist culture in the presence of their declining legitimacy as a result of liberalisation and democratisation trends. This strategy, no doubt, continues to subject the Red-Kelsenian and Yellow-Schmittian stars to, and even exacerbates, the gravitational pull of one upon the other.

#### ***2.4 Theoretical factors determining the gravitational pull***

It can be concluded from the Thai experience that the gravitational pull between the two stars is intertwined with interacting forces. Its momentum is therefore dynamic and subject to possible shifts. In this part, I conclude that three main factors orchestrate the gravitational strength of these stars, namely institutional, proximate political, and personal-subjective factors which also help explain possible future shifts in the momentum of the mutual gravitational pull.

The *institutional* factor is concerned with the political structure within which the gravitational pull occurs. It is related to the structure of the incumbent constitution, in particular, the space it provides for liberal democracy preferred by Kelsen and authoritarianism championed by Schmitt and the degree of political inference over the PoA it provides. This factor is also reinforced by the global trends of constitutionalism, liberalisation and democratisation, notably the globalisation of human rights. It is beyond the scope of this thesis

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<sup>593</sup> Section 5; Khemthong Tonsakulrungruang, 'Chaos, Kings, and Thailand's 20th Constitution' (*I•CON Blog*, 11 April 2017) <<http://www.icconnectblog.com/2017/04/chaos-kings-and-thailands-20th-constitution>> accessed 21 July 2018.

<sup>594</sup> Section 219

<sup>595</sup> Section 170

to synthesise the Kelsen-Schmitt debate on international law. However, the domestic gravitational pull between the Kelsenian and Schmittian stars in Thailand cannot avoid such trends. Due to rising demands for liberal democracy after the 1992 Black May incident, in 1996, Thailand acceded to the International Covenant on Civil and Political Rights, which obliges the state to inform the Secretary-General of the United Nations when it chooses to derogate from its treaty obligations when invoking emergency powers.<sup>596</sup> It is interesting to note that since 2010, both the Yellow and Red governments led by Abhisit and Yingluck and even the current military government led by Prayuth, resorted to such provisions when invoking the 2005 Decree and the Martial Law Act.<sup>597</sup> Although these notifications did not reduce much the abuse of emergency powers given the crackdown on the UDD in May 2010 and Prayuth's authoritarian uses of M-44, they at least politically reinforced the PDC after these 'Yellow' governments did not seek to disquiet the fact that their own acts violated liberal democracy, thus overstepping the fragile equilibrium to ensure that *Thai-ness* prevails over it.

Secondly, the *proximate political* factor is related to the degree of mass mobilisation. As illustrated by the Thai context, the direction of the gravitational pull is explicitly influenced by the vigour of social and political movements and the strength of expressions of public opinion on the use of emergency powers in the PCLD. The latter element is also related to the 'popularity' of a person/institution deemed to be the sovereign as well as of 'liberal democracy'. Thirdly, the *personal-subjective* factor includes the values and incentives upheld by all relevant actors in emergency powers in the PCLD, namely, the palace, the military, Constitutional Court judges, politicians, and mass activists.

Based on these factors, it can be concluded from the Thai experience that the Thai conservative elites still possess sufficient means (the institutional factor) and motivation (the personal-subjective factor) to obstruct liberal democracy by manipulating emergency powers in the PCLD. The politicisation of the Thai Constitutional Court, in particular since 2007, significantly keeps the gravitational pull by the Yellow star alive. Nevertheless, the shift from the normative perspectives of *individualism/collectivism*, *scepticism*, and *hostility* to the pragmatic hybrid suggested by the Thai experience underscores how 'a legitimate political order [is dependent] on accommodation [between] different social actors.'<sup>598</sup> As the conflict between liberals and conservatives in Thailand is being played out in the context of liberal

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<sup>596</sup> Article 4

<sup>597</sup> The Notifications under Article 4 (3) on 14 April 2010 (Abhisit); on 28 January 2014 (Yingluck); and on 8 July 2014 (Prayuth)

<sup>598</sup> Dressel, 'When Notions', p 464.

trends, the traditional elites are increasingly unable to maintain an absolute grip on power. Therefore, the ‘tide of history’ is moving more and more towards ‘Kelsen’ than ‘Schmitt’ but in such a way that the former needs to resort to the gravitational pull and the approach, notably the notions of ‘political friends’ and ‘concrete-order thinking’, adopted by the latter. Other factors, notably new human rights obligations (the institutional factor) and the rise of the masses (the proximate political factor), appear to increase the ‘costs and risks’ of the Yellow star, making the resort to the Red star more legitimate and appealing for the purpose of ‘self-interest preservation’ (the personal-subjective factor).

### **3. Final remarks: contributions of the binary-star conception and future studies**

The binary-star conception ostensibly expands the scope of the studies on emergency powers to address the topic of the PCLD, and goes beyond the question of whether such powers can be legally regulated. It provides an alternative understanding of the key elements of Kelsen’s and Schmitt’s constitutional emergency models and the relation between law, legality, the CoP, the SoE, and the masses in terms of the pragmatic hybrid. Meanwhile, as observed in Chapters 1 and 3, contemporary works on emergency powers built on Kelsen’s and Schmitt’s theories, notably those of Dyzenhaus and Gross, typically examine whether emergency powers are inside or outside a liberal-democratic legal order, including how to balance security with rights and liberties and what has to be the case for the derogation of rights and liberties in times of emergencies to be justified.<sup>599</sup> Despite claiming to propose a general theory of emergency powers, these authors assume an established commitment to legality, human rights, and liberal democracy, presumptions which compromise their application in the context of emergency powers in fledgling democracies experiencing the PCLD. They might engage the binary-star conception drawn from the Thai experience to address the deficiencies of their theories, including by acknowledging not only the benefits of Schmitt’s notion of political friends and the SoE to help drive forward the PoA but also the possible politicisation of the PoA. My thesis is also a useful milestone and comparison for other studies on elements inherent in their theories related to emergency powers, in particular, their competing concepts of constituent power/the constitution. However, the contribution of this thesis is not purely theoretical. The lessons deduced from the binary-star conception are also practical.

As I noted earlier, this thesis reminds us that the more entrenched the PCLD and the greater pull between the Red and the Yellow stars, the greater the enforcement and constraints of emergency powers are enmeshed with legal, political and social struggles. Therefore, such

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<sup>599</sup> See Sagos, *Democracy*, ch 4.



powers should not be only seen in terms of mechanisms for restoring ‘the norm’, but, more broadly, of legal and political strategies for managing the PCLD. At the national level, such struggles are important for ensuring ‘safe’ uses of the ISA, the 2005 Decree, and other emergency powers in the presence of the problems of law and norms deficits. Meanwhile, given that emergency powers in Thailand normally lead to the promulgation of new written constitutions to institutionalise the hegemony of *Thai-ness* and that the country is still experiencing *constitutional saṃsāra*, this PhD thesis also provides a milestone for constructing a conceptual framework for the constitution-making process, in particular, its relation to the accountability of emergency powers in such a deeply divided environment. Given the overthrow of the 1997 Constitution, such accountability does not depend on constitutionally thickening the identity thesis as Dyzenhaus suggests. Perhaps, the realisation of this goal requires accommodating the space for the alternative understanding of the SoE suggested by the binary-star conception within a constitution.<sup>600</sup> In a broader perspective, this PhD thesis also provides a useful comparison and springboard for future studies applying Kelsen’s and Schmitt’s theories or contemporary works built on them to evaluate the use of emergency powers or to establish mechanisms for ensuring ‘safe’ uses and preventing permanent states of emergency in other volatile political situations or, more generally, in other nascent countries struggling to realise a commitment to liberal constitutionalism. Bari and Omar, for instance, assess emergency powers in volatile political situations in Bangladesh, India and Pakistan by using contemporary works on emergency powers built on Kelsen’s and Schmitt’s theories. However, their arguments are ultimately limited to the amendments of law to ensure ‘safe’ emergency powers.<sup>601</sup> Unless the interaction between liberal and illiberal forces are understood, it is hardly likely comprehensively to build a theoretical framework for safeguards recommended to ensure ‘safe’ emergency powers and prevent their permanent use in these fledgling democracies. This current study might, however, provide a useful comparison.

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<sup>600</sup> Cf Lerner, *Making Constitutions*, p 179.

<sup>601</sup> Imtiaz Omar, *Emergency Powers and the Courts in India and Pakistan* (Kluwer 2002); M. Ehteshamul Bari, *States of Emergency and the Law: The Experience of Bangladesh* (Routledge 2017), pp 246-247.



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### Appendix 1: Kelsen and Schmitt compared

Criteria	Kelsen	Schmitt
<b>1. The theory of law</b>	The PTL (normativism)	The Three types of juristic thought (normativism, decisionism, and concrete order)
<b>2. The theory of politics</b>	Liberal democracy with the parliamentary regime	Identitarian democracy/against political romanticism
<b>3. The conception of authority to invoke emergency powers in the PCLD</b>	<i>Ex ante</i> legal authorisation/the legal accommodation model/autonomous value of legality	Sovereign authority to transcend normativism
<b>4. The scope of emergency powers in the PCLD</b>	Limited by legality to protect individual rights and liberties	Prioritising the state over individuals
<b>5. The conception of legal and political accountability</b>	Legal constitution with the constitutional court as the guardian of liberal constitutionalism	State-ism with the HoS as the guardian of the homogeneity of the people
<b>6. The AoH</b>	The politics of reconciliation	The politics of exclusion

## Appendix 2: Timeline

1351-1767: Ayutthaya Kingdom

1782-present: Bangkok (*Rattanakosin*) Kingdom

- 1851-1868: King Mongkut
- 1868-1919: King Chulalongkorn
  - the Chakri Reformation
- 1910-1923: King Vajiravudh
  - *Thai-ness* as state ideology
- 1925-1935: King Prajadhipok
  - The 1932 Revolution/constitutional monarchy established
- 1935-1946: King Ananda
- 1946-2016: King Bhumibol
  - 1947 – coup restoring *Thai-ness* and the DRMH
  - 1957 and 1958 – Sarit rose to power; royal hegemony restored
  - 1973 – popular uprising overthrowing Thanom Kittikachorn
  - 1976 – mass massacre at Thammasat University and coup
  - 1978 – the 1978 Constitution setting up semi-liberal democracy
  - 1988 – Chatchai Choonhavan won a general election
  - 1991 – coup overthrowing Chatchai
  - 1992 – the Black May incident
  - 1997 – the 1997 Constitution promulgated
  - 2001 – Thaksin Shinawatra became PM
  - 2005 – Thaksin won a general election by landslide
  - 2006 – the PAD rally and the coup overthrowing Thaksin
  - 2007 – the 2007 Constitution promulgated; Samak Sundaravej become PM
  - 2008 – the PAD protest; the Airport Crisis; the Constitutional Court ousting Samak and Somchai Sundaravej Wongsawat; Abhisit Vejjajiva became PM
  - 2009 – the UDD mass protest; the Bloody Songkran incident
  - 2010 – the UDD protest; the Savage May incident
  - 2011– Yingluck Shinawatra became PM
  - 2013 – the Amnesty Bill proposed; the PDRC launched a protest
  - 2014 – Prayuth Chan-ocha staged a coup ousting Yingluck and became PM himself



**About the author**

Rawin Leelapatana was born in Bangkok. He completes his LLB (1<sup>st</sup> class honours) from Chulalongkorn University in 2008 and LLM from the University of Bristol in 2011. In 2014, he receives a competitive scholarship from the Thai government to pursue his PhD in Bristol. His interests are constitutional law, legal philosophy, legal history, legal theory, and human rights.